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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the expense of preparation for trial constitute plain legal prejudice to a defendant, justifying denial of a motion to dismiss without prejudice under Federal Rule of Civil Procedure 41(a)(2) and dismissal with prejudice under Rule 41(b)?

PARTIES TO THE PROCEEDINGS

Petitioner Tenneco Oil Company is wholly-owned by Tenneco Corporation, which in turn is wholly-owned by Tenneco Inc. Pursuant to Rule 28.1, a complete listing of all subsidiaries and affiliates of Tenneco Inc. appears at Appendix F. Tenneco Oil Company was defendant-counterclaimant in the District Court and appellant in the Court of Appeals. Respondent Kern Oil & Refining Company was plaintiff-counterdefendant in the District Court and appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Tenneco Oil Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 24, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 792 F.2d 1380 and is reprinted in the appendix hereto ("App.") at 1a.

The findings of fact and conclusions of law of the District Court for the Central District of California (Real, C.J.) are unreported and are reprinted at App. 22a.

JURISDICTION

Respondent, a general partnership doing business in California, filed suit in District Court against petitioner, a Delaware corporation with its principal place of business in Texas, on the basis of diversity of citizenship, 28 U.S.C. § 1332. Petitioner filed a counterclaim and subsequently moved pursuant to Federal Rule of Civil Procedure 41(a)(2) for dismissal of its counterclaim without prejudice. The District Court denied the motion and instead dismissed the counterclaim with prejudice pursuant to Rule 41(b). Judgment was entered for respondent, and petitioner appealed.

The Court of Appeals affirmed on June 24, 1986, and a timely-filed petition for rehearing was denied on September 11, 1986. App. at 32a. On November 13, 1986, Justice O'Connor issued an order extending the time in which to file a petition for certiorari to and including January 9, 1987. App. at 33a. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

PERTINENT RULES

Rule 41(a) of the Federal Rules of Civil Procedure provides:

> (a) Voluntary Dismissal: Effect Thereof:
>
> (1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudica-

tion upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

In 1977 Tenneco Oil Company ("Tenneco") and Kern Oil & Refining Company ("Kern") entered into a contract for the sale and exchange of oil. At the time, the price of oil was subject to government control. The contract was not unusual in the era of price control, and essentially provided that Tenneco would supply Kern with the oil production from certain Tenneco fields in

California, while Kern would supply Tenneco with oil in Texas and New Mexico. The contract also indicated the prices to be paid by Kern for oil it received that was not balanced by oil Tenneco received from Kern.

The deregulation of oil prices, beginning in 1980, led to disagreement between the parties over the requirements of the contract and applicable regulations. Kern responded to this disagreement in 1981 by filing separate lawsuits over the issues of price and supply. The lawsuits were filed in the same court, the United States District Court for the Central District of California, but they were assigned to different judges. The price litigation, in which Kern alleged that it had overpaid Tenneco, was eventually assigned to Judge Marshall. The supply litigation, in which Kern alleged that Tenneco violated various regulations in failing to supply it with oil, was assigned to Judge Waters.[1]

In August 1981, Tenneco filed a counterclaim in the price litigation before Judge Marshall. That counterclaim—the subject of the present petition—sought lost profits from the admitted failure of Kern to supply Tenneco with oil as required under the contract. Later, in December 1982, Kern filed yet another lawsuit in the same District. Like the suit pending before Judge Waters, this latest action also alleged that Tenneco failed to supply Kern with oil. The basis of the new suit, however, was not violation of regulations but rather breach of contract. This new case was assigned to Judge Marshall, who transferred it to Judge Waters. The new suit was consolidated with the supply litigation before Judge Waters, and Tenneco promptly filed in the consolidated action a counterclaim identical to the one it had previously filed in the price litigation.

At this point, then, litigation over *price* was pending before Judge Marshall and litigation over *supply* was

[1] The complaint in the price case was filed in February 1981. The complaint in the supply case was filed in July 1981.

pending before Judge Waters. Tenneco's counterclaim—concerned with *supply*—was pending in both actions. This was the only prudent course of action for Tenneco, since the counterclaim was compulsory in both cases. *See* Fed. R. Civ. P. 13(a).

In February 1984, Judge Marshall granted Kern's motion for partial summary judgment directed against Tenneco's counterclaim. Shortly thereafter, however, Tenneco uncovered new evidence during discovery in the supply case before Judge Waters undermining the asserted basis for Kern's motion. On the basis of this evidence, Tenneco moved in the price case for reconsideration of the grant of partial summary judgment and, if reconsideration were granted, voluntary dismissal of the counterclaim without prejudice. The purpose of the latter motion was to permit Tenneco to pursue its supply counterclaim in the supply case, where it was pending and where—as the discovery demonstrated—it more properly belonged.

Judge Marshall's next step in the price case, however, was to transfer the issues remaining for trial to Judge Real. In the middle of trial on those issues before Judge Real, Judge Marshall granted Tenneco's motion for reconsideration and vacated the summary judgment, but did not act on the accompanying motion for voluntary dismissal without prejudice. After trial in the price case before Judge Real concluded, Judge Real set the issues raised by the counterclaim for trial before him. Only then did Judge Marshall deny Tenneco's motion to dismiss the counterclaim without prejudice.

Tenneco immediately renewed its motion to dismiss before Judge Real. Judge Real denied the motion, concluding that he "does not have jurisdiction to overrule Judge Marshall's Order denying Tenneco's motion." App. at 28a. According to Judge Real, Tenneco's motion "constitutes an impermissible 'horizontal appeal' of Judge Marshall's decision." *Id.* In addition, Judge Real

stated that Tenneco's motion was made for the purpose of impermissible forum shopping.[2] He also found that

> Kern would be prejudiced by a voluntary dismissal of [the counterclaim] without prejudice because of, *inter alia*, the extensive discovery taken in this case, the burden of duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial on August 20, and the fact that [the counterclaim] arising out of the contracts before the court in the first trial make [it] a compulsory counterclaim in this case. [*Id.* at 27a.]

Tenneco declined to proceed to trial after Judge Real denied both its motion to dismiss and a subsequent motion for continuance. Judge Real thereupon dismissed Tenneco's counterclaim *with prejudice* pursuant to Fed. R. Civ. P. 41(b).[3]

On appeal, the Ninth Circuit recognized that "[t]he district court was incorrect" in ruling that it had no jurisdiction to consider Tenneco's motion for dismissal without prejudice. App. at 20a. The Court of Appeals nonetheless affirmed the denial of the motion, rejecting Tenneco's contention that its purpose in seeking dismissal was to try its supply counterclaim in the supply case, where it belonged. According to the court, the counterclaim was compulsory in the price case, and therefore Tenneco could not dismiss it from that case to pursue it in the supply case.

The Court of Appeals concluded that the District Court's findings concerning prejudice to Kern were supported by the record, though it acknowledged that "the extent of the prejudice to Kern Oil is questionable." *Id.* at 21a. Recognizing that "the handling of the various ac-

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[2] The District Court adopted findings of fact proposed by Kern virtually verbatim.

[3] Judge Waters subsequently dismissed Tenneco's counterclaim before him as res judicata.

tions between Tenneco and Kern Oil was less than ideal" and that it "would have been appropriate to consolidate the various actions," the court nonetheless concluded that "[i]n light of Judge Real's findings of fact, * * * the dismissal of [the counterclaim] did not constitute an abuse of discretion." *Id.* at 21a.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among The Circuits Over Whether Mere Expense Of Preparation For Trial Can Constitute "Plain Legal Prejudice" Justifying Denial Of A Motion For Voluntary Dismissal

The court below upheld the denial of a Rule 41(a)(2) motion for voluntary dismissal when the only prejudice to the defendant consisted of the expense of preparing for trial on the claim to be dismissed. Most Courts of Appeal addressing the question have recognized that such expense does not constitute plain legal prejudice to a defendant justifying denial of such a motion, while a small minority have apparently held to the contrary. This Court should grant the writ to resolve this basic conflict in the application of an important Federal Rule.

At common law a plaintiff had an absolute right to dismiss his action without prejudice at any time prior to judgment or verdict. *See Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924); *Kern* v. *TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). The adoption of the Federal Rules of Civil Procedure limited that right, requiring an order of the court—with such terms and conditions as the court deems proper—before a plaintiff could obtain a dismissal without prejudice after answer or motion for summary judgment by the defendant. Fed. R. Civ. P. 41(a)(2). The purpose of Rule 41 was not generally to restrict voluntary dismissals, but rather to prevent only those dismissals "which unfairly affect the other side, and to permit the imposition of

curative conditions." *Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 146 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961).

Courts have accordingly recognized that a motion for voluntary dismissal under Rule 41(a)(2) should generally be granted, unless the other party would suffer plain legal prejudice. "The basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced." *Le Compte* v. *Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). *See, e.g., McCants* v. *Ford Motor Co., Inc.*, 781 F.2d 855, 856-857 (11th Cir. 1986) ("in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice, *other than the mere prospect of a subsequent lawsuit*, as a result") (emphasis in original); *Puerto Rico Maritime Shipping Authority* v. *Leith*, 668 F.2d 46, 50 (1st Cir. 1981); *Stern* v. *Barnett*, 452 F.2d 211, 213 (7th Cir. 1971). As the court noted in *Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983), "a defendant must demonstrate plain legal prejudice in order to prevent a voluntary dismissal of the claim against him by a plaintiff."[4] The decision below, however, has exacerbated a conflict among the Circuits over what can constitute the "plain legal prejudice" that would justify denial of a motion for voluntary dismissal.

Several Courts of Appeal have held that the mere expense incurred by a defendant in preparing for trial cannot amount to the sort of "plain legal prejudice" sufficient to justify denial of a motion under Rule 41(a)(2).

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[4] *See* Wright & Miller, Federal Practice and Procedure: Civil § 2364, at 165 (1971) ("the courts have generally followed the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit"); 5 Moore's Federal Practice ¶ 41.05[1], at 41-53 (1986) ("dismissal should in most instances be granted, unless the result would be to legally harm the defendant").

A leading case is *Alamance Industries, Inc.* v. *Filene's, supra.* There, plaintiff filed a patent infringement claim in the United States District Court for the District of Massachusetts after filing a counterclaim for infringement of the same patent in a pending action in the Middle District of North Carolina. The District Court in Massachusetts denied plaintiff's subsequent motion for voluntary dismissal, noting that the plaintiff had "gotten the defendant to spend money to get a lawyer" in Massachusetts. 291 F.2d at 144. On appeal, the First Circuit reversed. In his opinion for the court, Judge Aldrich emphasized that the reasons given by the trial court for denying the motion "were patently insufficient. These were merely a recitation of the very circumstances calling the rule into play. Something else was needed, and we find nothing else present." *Id.* at 147.

The position of the First Circuit in *Alamance Industries* was recently reaffirmed in *Puerto Rico Maritime Shipping Authority* v. *Leith, supra.* In that case the plaintiff sought voluntary dismissal of the complaint it filed in federal District Court in order to pursue the same claim in a court of the Commonwealth of Puerto Rico. The federal trial court granted the motion, and the First Circuit affirmed. As the Court of Appeals emphasized:

> Dismissal without prejudice should be permitted under the rule unless the court finds that the defendant will suffer legal prejudice. Neither the prospect of a second suit nor a technical advantage to the plaintiff should bar the dismissal. [688 F.2d. at 50.]

The court specifically rejected defendants' contention that they suffered prejudice in light of "the lengthy and costly discovery involved in this suit." *Id.* As the court noted, "this discovery has not been wasted, as much of it remains relevant to the suit currently pending in a court of the Commonwealth of Puerto Rico." *Id.* (foot-

note omitted). In the present case, any discovery concerning Tenneco's counterclaim would of course be directly relevant to the same counterclaim pending before Judge Waters, and the parties had agreed that discovery in either case could be freely used in the other.

The Fifth Circuit follows the same approach as the First. In *Durham* v. *Florida East Coast Railway Co.*, 385 F.2d 366 (5th Cir. 1967), the District Court—like the District Court in this case—denied plaintiff's motion for voluntary dismissal under Rule 41(a)(2) and dismissed the action with prejudice under Rule 41(b) when the plaintiff announced he could not proceed to trial. The Court of Appeals reversed. Judge Wisdom, writing for the court, stressed that the " 'sanction of dismissal [with prejudice] is the most severe sanction that a court may apply, and its use must be tempered by a *careful* exercise of judicial discretion.' " 385 F.2d at 368 (quoting *Durgin* v. *Graham*, 372 F.2d 130, 131 (5th Cir.), *cert. denied*, 388 U.S. 919 (1967)) (emphasis in original). The court recognized that counsel "had traveled long distances" for trial and that the court and jurors would be inconvenienced, but emphasized that the "crucial question to be determined is, [w]ould the defendant lose any substantial right by the dismissal." 385 F.2d at 368. The expense and inconvenience to the defendant did not constitute " 'plain legal prejudice,' " and accordingly voluntary dismissal should have been granted. *Id.* (quoting 2 Barron and Holtzoff, Federal Practice and Procedure § 912).

The Fifth Circuit elaborated on the distinction between "plain legal prejudice" and mere expense and inconvenience to the defendant in *Le Compte* v. *Mr. Chip, Inc.*, *supra*. In that case the *plaintiff* appealed a grant of voluntary dismissal because the District Court imposed excessively onerous conditions, including limitations on the plaintiff's right to pursue the same claim in the future. The Court of Appeals reversed and directed the trial court to impose "only such conditions as

are necessary to protect the legitimate interest of defendants." 528 F.2d at 605. The court emphasized that "in most cases a dismissal should be granted unless the defendant will suffer some *legal* harm," and that permitting the court to attach conditions to the dismissal "prevents defendants from being unfairly affected by such dismissal." *Id.* at 604 (emphasis supplied). The Fifth Circuit thus drew a distinction between "legal harm" to the defendant—which would justify denial of a motion for voluntary dismissal—and mere expense or inconvenience—which could be fully cured by appropriate conditions.

The same distinction was embraced by the Seventh Circuit in *Quad/Graphics, Inc.* v. *Fass, supra.* The court in that case stated that under Rule 41(a)(2), "a showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient to justify denying the plaintiff's motion to dismiss." 724 F.2d at 1233. As the court noted, such considerations are only relevant to the question whether the court should require the plaintiff to pay the defendant's costs or attorney's fees in the dismissed action as conditions of dismissal. *Id.* at 1233 n.2. Any "additional expense and effort" required of the defendants "by itself is insufficient to demonstrate plain legal prejudice." *Id.* at 1234.[5]

In *Kern* v. *TXO Production Corp., supra,* the Eighth Circuit affirmed the grant of a motion to dismiss without prejudice, even though the motion was made not prior to trial, as here, but well into trial. The court noted that such motions should be granted if no other party would be prejudiced.

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[5] *See also Victory Beauty Supply, Inc.* v. *La Maur, Inc.,* 98 F.R.D. 306, 307 & n.3 (N.D. Ill. 1983) ("legal expenses incurred" do not constitute "legal prejudice" justifying denial of a motion for voluntary dismissal).

> By "prejudice" in this context is meant something other than the necessity that defendant might face of defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its costs and expenses incurred in the first action. [738 F.2d at 970.]

The District of Columbia Circuit recently recognized that "[i]n federal practice, voluntary dismissals sought in good faith are ordinarily granted if the only harm suffered by the defendant is the expense of preparing a responsive pleading, since 'he can be made whole if dismissal is conditioned upon reimbursement by the plaintiff.'" *Conafay* v. *Wyeth Laboratories*, 793 F.2d 350, 353 (1986) (quoting Note, *Exercise of Discretion in Permitting Dismissals Without Prejudice Under Federal Rule 41(a)*, 54 Col. L. Rev. 616, 618 (1954)). The Court of Appeals remanded the case to the District Court for a statement of the reasons for that court's decision to deny the motion under Rule 41(a)(2), since it was unclear from the record if "the court even considered whether establishing terms and conditions as expressly authorized by the Rule" would alleviate any harm to the defendant. 793 F.2d at 353.

The approach of these Circuits—distinguishing between "plain legal prejudice" justifying the denial of a Rule 41(a)(2) motion and mere expense or inconvenience to the defendant—is compelled by the logic of the Rule. The need for court action only arises if the motion for voluntary dismissal is made after answer or motion for summary judgment by the defendant. Prior to that time the plaintiff has an absolute right, without court approval, to dismissal without prejudice. Fed. R. Civ. P. 41(a)(1). Rule 41(a)(2) by definition only comes into play when the defendant has incurred legal expense in defending against the plaintiff's claim, and accordingly such expense in itself cannot constitute the "plain legal prejudice" justifying denial of a motion under the Rule. *See Alamance Industries, Inc.* v. *Filene's*,

291 F.2d at 147. Otherwise, it would *always* be proper to deny such a motion, a result clearly not intended by the draftsmen and soundly rejected by the courts.

The Rule itself provides a ready means of completely curing any injury in fact to the defendant arising from litigation expense. *See Cone* v. *West Virginia Paper Co.*, 330 U.S. 212, 217 (1947). Rule 41(a)(2) permits the court to impose "such terms and conditions as the court deems proper" upon granting a motion under the Rule, and courts routinely grant such motions subject to the condition that the plaintiff reimburse the defendant for costs and attorney's fees. *See, e.g., McLaughlin* v. *Cheshire*, 676 F.2d 855, 856 (D.C. Cir. 1982) ("It is common for courts to require plaintiffs to pay their opponents' reasonable legal fees and costs as a condition of dismissal under Rule 41(a)(2)"); *Puerto Rico Maritime Shipping Authority* v. *Leith*, 668 F.2d at 51.[6] Since the Rule itself makes provision for curing any injury in fact to the defendant arising from litigation expense, it seems clear that such expense in itself cannot be considered "plain legal prejudice" justifying denial of a motion under the Rule.[7]

The kind of plain legal prejudice that has been held sufficient to justify denial of a Rule 41(a)(2) motion

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[6] *See also* Wright & Miller, *supra*, § 2366, at 177 (usual practice "is for the plaintiff simply to move for dismissal without saying anything about conditions and for the court to specify on what conditions it will allow dismissal"); Note, *Exercise of Discretion in Permitting Dismissals Without Prejudice Under Federal Rule 41(a)*, 54 Col. L. Rev. at 618 ("if the only hardship caused defendant by the dismissal is the expense of preparing his case, he can be made whole if dismissal is conditioned upon reimbursement by the plaintiff").

[7] Nor would it make sense to suggest that a District Court has discretion to deny a Rule 41(a)(2) motion solely on the basis of trial preparation expense when the expense is great. No matter what the degree of expense, any injury in fact to the opposing party can be completely cured by conditioning dismissal on reimbursement of the expenses by the moving party.

stands in marked contrast to the mere injury in fact of litigation expense. Such plain legal prejudice to the defendant arises, for example, when the plaintiff seeks voluntary dismissal after it is apparent he has already lost the case. *See, e.g., Williams* v. *Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980). Such prejudice may also arise when the plaintiff seeks dismissal to pursue his claim in another state applying more favorable law, *see, e.g., Kennedy* v. *State Farm Mutual Automobile Ins. Co.*, 46 F.R.D. 12 (E.D. Ark. 1969), or when the plaintiff has waived his right to jury trial by failing to make timely demand and seeks dismissal to regain it. *See, e.g., Noonan* v. *Cunard Steamship Co.*, 375 F.2d 69 (2d Cir. 1967). Or such prejudice may arise when the defendant has impleaded a third-party defendant, and prosecution of the claim against the third-party defendant may be prejudiced by dismissal of the plaintiff's claim. *See, e.g., Piedmont Interstate Fair Ass'n* v. *Bean*, 209 F.2d 942 (4th Cir. 1954). In such cases dismissal without prejudice would impose legal harm on the defendant, rather than simply the burden of litigation expense. Only then is denial of a Rule 41(a)(2) motion appropriate.

A small minority of Circuits, however, have apparently held that the financial cost of preparing for trial can constitute legal prejudice justifying denial of a motion under Rule 41(a)(2). In *Andes* v. *Versant Corp.*, 788 F.2d 1033 (4th Cir. 1986), the court held that there was sufficient basis to deny a motion under Rule 41(a)(2) when defendants "incurred significant expenses, not only in responding to Andes' complaint and filing motions and memoranda in support of summary judgment, but also by incurring substantial costs of discovery, through depositions, production of documents, and obtaining of expert opinions on English law." *Id.* at 1036 (footnote omitted). The court conceded that "this is not a case of extreme prejudice to defendants," but none-

theless upheld the denial. In *Ferguson* v. *Eakle*, 492 F.2d 26 (3d Cir. 1974), the court reversed the District Court's decision to grant voluntary dismissal under the Rule. The Court of Appeals relied, at least in part, on the fact that a second lawsuit would result in "financial prejudice requiring additional counsel fees for the time and energies to be expended for the preparation and conduct of new discovery and proceedings up to trial." *Id.* at 29 (footnote omitted).[8]

Then-Circuit Judge Scalia appears to have aligned himself with this minority view. In *Conafay* v. *Wyeth Laboratories*, *supra*, he dissented and wrote that "I do not agree with those decisions in other circuits which assert that the district court must grant this 41(a)(2) dismissal unless it would result in substantial prejudice to the defendant other than a second lawsuit or some tactical disadvantage." 793 F.2d at 354. Whether now-Justice Scalia was right or wrong—and we respectfully suggest that he was in error—his view demonstrates, and indeed acknowledges, the sharp difference of opinion among appellate judges on the subject at issue here.

The court below also aligned itself with the minority approach.[9] The Court of Appeals upheld the District

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[8] The court also noted that the defendants suffered "all the emotional and psychological trauma" of preparing for trial in one forum and then starting anew in another, and the uncertainty of not having the legal claim against them resolved. 492 F.2d at 29. Such "prejudice," however, has been generally dismissed by other Circuits as "the mere prospect of a subsequent lawsuit." *McCants* v. *Ford Motor Co., Inc.*, 781 F.2d at 857.

[9] Prior to the decision below, the Ninth Circuit seemed to subscribe to the majority approach. In *Hamilton* v. *Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143 (1982), the court stated that "[a]ppellant has not established plain legal prejudice merely by asserting that it had begun trial preparations" and that "the District Court addressed and disposed of the issue of possible prejudice by awarding costs to defendant upon dismissal." *Id.* at 145. In light of the decision below, however, *Hamilton* can no longer

Court's denial of Tenneco's motion when the *only* prejudice to Kern identified by the District Court was "the extensive discovery taken in this case, the burden of duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial * * *." App. at 21a.[10] As noted, most Circuits have held that any such burden on a defendant does not constitute "plain legal prejudice" justifying denying of a motion under Rule 41(a)(2).[11] The decision of the court below conflicts with the decisions of those Circuits.

This conflict cannot be mitigated on the ground that Tenneco was somehow engaged in impermissible "forum shopping." Tenneco simply sought to try its supply counterclaim in the supply litigation—where it properly belonged—rather than in the price litigation, in which trial had been concluded by the time the counterclaim came before Judge Real. The court below rejected this explanation on the curious ground that the counterclaim

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be regarded as controlling in the Ninth Circuit, and cannot be relied upon to avoid the conflict among the Circuits heightened by the decision below.

[10] In its finding on prejudice, the District Court also noted that Tenneco's counterclaim was compulsory, App. at 27a, but it is difficult to discern how this constitutes prejudice to Kern. The identical counterclaim was also compulsory in the supply litigation before Judge Waters, and Tenneco had the right to pursue it in either case without waiver for failure to litigate it in the other. *See infra* at 17-18.

[11] This is particularly true when, as here, the preparation and expense in the first case are not wasted but may be used when the plaintiff pursues the same claim in the second case. *See, e.g., McLaughlin* v. *Cheshire*, 676 F.2d at 857 ("the defendant is not entitled to reimbursement for expenses incurred in preparing work product that has been or will be useful in the continuing litigation"); *Cauley* v. *Wilson*, 754 F.2d 769, 772 (7th Cir. 1985) ("the fee award should reimburse the defendant for expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim"); *Kern* v. *TXO Production Corp.*, 738 F.2d at 972-973.

was compulsory in the price litigation, and thus would have been lost even if dismissed without prejudice. App. at 19a.

The counterclaim, however, was also compulsory in the supply litigation—indeed, somewhat more so, since it concerned supply issues like the case in chief. In such circumstances, it is clearly established that a counterclaimant like Tenneco does not lose its claim by deciding to pursue it in the second rather than the first suit filed by its adversary. As this Court ruled in *Southern Construction Co., Inc.* v. *Pickard*, 371 U.S. 57, 60-61 (1962) (citations and footnote omitted):

> The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim "shall" be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint.
>
> It is readily apparent that this policy has no application here. In this instance, the plaintiff-respondent, who originally sought to combine all his claims in a single suit, correctly concluded that he was required by statute to split those claims and to bring two separate actions in two different districts. * * * [T]he primary defendant in both actions was thus for the first time confronted with the choice of which of the two pending suits should be resorted to for the assertion of a counterclaim common to both. Under these circumstances, we hold that Rule 13(a) did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed. Its assertion in the later suit, to which [defendant], not without reason, considered it more appurtenant, by no means

> involved the circuity of action that Rule 13(a) was aimed at preventing.

It was Kern—not Tenneco—that chose to file two separate actions, and Tenneco had the right to pursue the compulsory counterclaim common to both actions in the suit to which it considered it "more appurtenant." *Id.*

There was no prudent alternative for Tenneco but to plead the counterclaim in the first action filed by Kern —the price case—since it was a compulsory counterclaim in that case. Tenneco also had an absolute right to file the identical counterclaim in the second action filed by Kern—the supply case—in which it was also a compulsory counterclaim. Tenneco thereafter had the right to dismiss either counterclaim without prejudice.

The court below penalized Tenneco for its choice by denying its motion for voluntary dismissal and dismissing with prejudice. The federal courts have consistently recognized that an involuntary dismissal with prejudice under Rule 41(b) is "a drastic sanction to be applied only in extreme situations," *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959), and have permitted it "only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Durham* v. *Florida East Coast Railway Co.*, 385 F.2d at 368. *See, e.g., Goforth* v. *Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) ("Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances"). Here, all that Tenneco sought to do was try its counterclaim in the more logical of the two cases filed by its adversary. Any "burden" on Kern in the form of duplicative discovery or trial preparation was caused by Kern's own decision to file separate actions against Tenneco. Granting Tenneco's motion would not have resulted in any delay in adjudicating its counterclaim, since the counterclaim was already pending in the supply litigation.

The court below recognized that "the handling of the various actions between Tenneco and Kern Oil was less than ideal" and that the actions should have been consolidated. App. at 21a. There is no basis in law or in the record, however, for making Tenneco pay for any glitches in judicial administration, and certainly not for requiring Tenneco to pay the ultimate price of having its claim dismissed without any hearing on the merits. Tenneco had the right to pursue its counterclaim in its choice of the various cases filed by Kern, and Kern suffered no legal prejudice when Tenneco elected to proceed in the supply litigation. The decision below to the contrary is inconsistent with decisions of other Circuits, and this Court should grant the writ to resolve the conflict.

II. Review By This Court Is Necessary To Ensure Uniform Application Of The Federal Rules Of Civil Procedure

There is perhaps no area of federal law in which the need for uniformity is as pressing as in the interpretation of the Federal Rules of Civil Procedure. The Rules govern the thousands of suits filed in federal court each year. The Rules themselves were intended to " 'bring about uniformity' " in the conduct of federal litigation, S. Rep. No. 1049, 73d Cong., 2d Sess. (1934) (quoting letter from Attorney General Homer Cummings), and that critical objective cannot be attained in the absence of resolution by this Court of conflicts that arise in the interpretation of the Rules.

The need for resolution of the conflict that has developed among the Circuits over Rule 41 is in no sense diminished because disposition of a motion under the Rule rests, in the first instance, with the sound discretion of the District Court. As Judge Friendly noted in *Noonan* v. *Cunard Steamship Co.*, 375 F.2d at 71:

> the fact that dismissal under Rule 41(a)(2) usually rests on the judge's discretion does not mean

> that this is always so. Several of the most important reasons for deferring to the trial judge's exercise of discretion * * * are inapposite when a question arising in advance of trial can be stated in a form susceptible of a yes-or-no answer applicable to all cases.

The question at issue in this case can be so stated: Is the mere expense of litigation and preparation for trial "plain legal prejudice" to a defendant sufficient to justify denial of a motion for voluntary dismissal under Rule 41(a)(2)? As noted, most Circuits have answered "no." The court below and a minority of other Circuits have answered "yes." In light of this conflict in interpretation, indistinguishable cases in the federal courts will yield different results. The fact that the decision in any particular case is vested in the first instance in the trial court's discretion does nothing to obviate the need for this Court to resolve this conflict.

Judge Friendly considered this theme of appropriate appellate review of the exercise of discretion important enough to return to it in his extra-judicial writing:

> The rulemakers gave the district courts discretion; but after enough of them had decided always to exercise it the same way, * * * the channel of discretion had narrowed, and a court of appeals should keep a judge from steering outside it rather than allow disparate results on the same facts. [Friendly, *Indiscretion About Discretion*, 31 Emory L. J. 747, 772 (1982).]

This logic applies *a fortiori* to review by this Court of interpretations of the Rules by the various Courts of Appeal.

In a celebrated case, Chief Justice John Marshall noted that "a motion to the discretion of the court * * * is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807)

(No. 14,692d). The decision below has exacerbated a conflict over the legal principles that should guide the exercise of a District Court's discretion under Rule 41 (a) (2). Permitting this conflict to persist would leave application of the Rule to each court's "inclination" rather than to its informed judgment, and would result in an inconsistent application of the Rule that this Court should not condone.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. Nos. 84-6268
84-6367
84-6482

D.C. No. CV 81-0791-R

KERN OIL AND REFINING CO.,
Plaintiff/Counter-Defendant-Appellee,

vs.

TENNECO OIL CO.,
Defendant/Counterclaimant-Appellant.

On Appeal From the United States District Court
for the Central District of California
The Honorable Manuel L. Real, District Judge, Presiding

Argued and Submitted August 6, 1985, Los Angeles, California

[Filed June 24, 1986]

OPINION

Before: ANDERSON, BEEZER and BRUNETTI, Circuit Judges.

BEEZER, Circuit Judge:

Kern Oil & Refining Co. filed an action against Tenneco Oil Company, seeking restitution for payments made to Tenneco under an alleged mistake of fact. Tenneco filed various counterclaims, including a claim for lost profits arising out of Kern Oil's failure to supply crude oil to Tenneco. In No. 84-6268, Tenneco challenges the district court's judgment in favor of Kern Oil on the restitution claim. In No. 84-6482, Tenneco seeks reversal of the district court's order granting attorneys' fees to Kern Oil. In No. 84-6367, Tenneco challenges the dismissal of the lost profits counterclaim for lack of prosecution. We affirm.

I

Background

Kern Oil is a general partnership doing business in California.[1] Tenneco is a Delaware corporation with its principal place of business in Texas. On May 19, 1977, Tenneco entered into a contract to sell crude oil to Kern Oil. Tenneco agreed to sell its production from twenty-four specified leases to Kern Oil. The contract contained the following terms:

> Crude oil from the above leases will be balanced against crude oil sold to Tenneco by [Kern Oil] up to 3,000 barrels per day. All stripper crude oil from the above leases and the Rosecrans Field . . . will be sold at the appropriate lower tier price. Each month, enough oil from the Yowlumne Field will be sold at the lower tier price to make the total stripper and Yowlumne crude oil sold at the lower tier price equal to 3,000 barrels per day. *The remaining bar-*

[1] Kern Oil is successor in interest to Kern County Refinery, Inc., which was dissolved in 1982.

> *rels produced from the Yowlumne Field will be sold at the upper tier price, and the non-stripper leases will be sold at the appropriate lower or upper tier prices.*

(emphasis added). The primary issue in this case is the interpretation of those terms.

In the mid-1970s, the Federal Energy Administration adopted a complex system to regulate the price of domestic crude oil. The FEA divided crude oil into three classes: "old," "new," and "stripper well." 10 C.F.R. §§ 212.54, 212.72 (1977). "Old" crude oil of a particular grade could not be sold for a price higher than the "lower tier ceiling price" for that grade. *Id.* § 212.73(a). "New" crude oil of a particular grade could not be sold for a price higher than the "upper tier ceiling price" for that grade. *Id.* § 212.74(a). "Stripper well" crude oil could be sold at any price. *Id.* § 212.54(a)-(b).

By 1980, this system had become more complicated. As a part of the Carter Administration's effort to deregulate crude oil, the Department of Energy created several new classes of crude oil that could be sold at market price. One such class was "market level new" crude oil. The regulation stated:

> "Market level new crude oil" means, with respect to a particular property during a particular month, the product of the market level factor for that month and the volume of new crude oil produced and sold from that property during that month. The market level factor for January 1980 shall be four and six-tenths percent (4.6%) and shall be increased by four and six-tenths percent (4.6%) in each succeeding month.

10 C.F.R. § 212.72 (1980). "Market level new" crude oil is also referred to as "upper-tier released" crude oil. Under this system, all "new" crude oil would be deregulated in twenty-two months. The DOE also created two

new classes of deregulated crude oil: "newly discovered" crude oil, *id.* § 212.79, and "tertiary incentive" crude oil, *id.* § 212.78(a)(2).

After Kern Oil and Tenneco entered into the contract, Tenneco consistently charged Kern Oil the posted upper tier price for "new" crude oil. At times, the posted upper tier price was less than the upper tier ceiling price. Accordingly, much of the crude oil was sold at prices below the ceiling price.

Beginning with the invoices for oil delivered in January 1980, Tenneco charged Kern Oil uncontrolled prices for a portion of the oil delivered pursuant to the contract. Tenneco's invoices described this crude oil as "newly discovered" or "upper-tier released." Kern Oil's accounting staff was not aware of the price limitation in the contract and thus paid the invoices without question. Kern Oil's management did not learn of the discrepancy until December 1980.

On December 30, 1980, Kern Oil notified Tenneco of the alleged overpayments and informed Tenneco that Kern Oil would withhold payment on outstanding Tenneco invoices to offset the overpayments. On February 13, 1981, Kern's attorneys sent a letter to Tenneco demanding reimbursement for the alleged overpayments. Kern Oil subsequently filed the present action to obtain restitution of the alleged overpayments.[2] Tenneco's answer contained six counterclaims, two of which were settled before trial.

A. *Nos. 84-6268 and 84-6482*

The case was initially set before Judge Marshall. On March 20, 1984, Judge Marshall transferred the case to

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[2] Kern Oil characterizes this action as a suit for breach of contract. It is apparent, however, that Tenneco never actually breached the contract. As a result, this action is properly characterized as a suit for restitution of overpayments. *See* 3 G. Palmer, *The Law of Restitution* § 14.8 (1978); Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65, 92-95 (1985).

Judge Real for trial. The case was tried in June 1984. On July 31, 1984, Judge Real entered judgment for Kern Oil. Kern Oil received damages in the sum of $1,901,-430.72, plus interest, costs, and attorneys' fees. On October 4, 1984, the attorneys' fee award was fixed at $516,863.13.

B. *No. 84-6367*

Tenneco's fourth counterclaim ("Count IV") sought damages for lost profits. On Februrary 16, 1984, Judge Marshall granted Kern Oil's motion for a partial summary judgment and dismissed Count IV. On March 16, 1984, Tenneco filed a motion for reconsideration. After the rest of the case had been transferred to Judge Real, Tenneco filed a motion for voluntary dismissal without prejudice. Tenneco sought the voluntary dismissal so that it could pursue its claim in a related action before Judge Waters. While Judge Marshall considered these motions, the rest of the case was tried before Judge Real.

On June 14, 1984, Judge Marshall granted the motion for reconsideration and vacated the summary judgment. The parties did not become aware of that decision until late June. On August 3, Judge Marshall denied the motion for voluntary dismissal. Judge Real set a trial date of August 20. On August 13, Tenneco renewed its motion for voluntary dismissal without prejudice. On August 20, Judge Real denied the motion and stated that the trial would commence on August 22. Tenneco then unsuccessfully sought an emergency stay from this court.

On the morning of August 22, the parties appeared before Judge Real. After again denying Tenneco's request for a voluntary dismissal without prejudice, Judge Real requested Tenneco's attorney to proceed with his opening statement. When the attorney refused to proceed, Judge Real dismissed Count IV with prejudice under Fed. R. Civ. P. 41(b).

II

The Interpretation of the Contract

A. *Standard of Review*

We have stated the appropriate standard of review for the interpretation of a contract as follows:

> When an appellate court restricts its review of the trial court's interpretation of a contract to an analysis of the language used in the contract, the issue of interpretation is a matter of law and freely reviewable . . . . When the interpretation includes a review of factual circumstances surrounding the contract, the principles of contract interpretation applied to those facts present issues of law which this court can freely review. When the inquiry extends beyond the words of the contract and focuses on related facts, however, the trial court's consideration of extrinsic evidence is entitled to great deference and its interpretation of the contract will not be reversed unless it is clearly erroneous.

In re U.S. Financial Securities Litigation, 729 F.2d 628, 631-32 (9th Cir. 1984) (citations omitted). We review the district court's decisions regarding the admissibility of evidence for an abuse of discretion. *Mitchell v. Keith*, 752 F.2d 385, 392 (9th Cir.), *cert. denied*, 105 S.Ct. 3502 (1985).

B. *The Meaning of "Upper Tier Price"*

Contrary to Tenneco's assertions, the record reveals that the meaning of the term "upper tier price" was virtually undisputed. The "upper tier price" was the price charged for crude oil that was subject to the upper tier ceiling price. The upper tier price was less than or equal to the upper tier ceiling price, depending on market conditions. Crude oil that was not subject to the upper tier ceiling price was sold at the "lower tier price" or the "uncontrolled price," depending on the type of oil.

"New" crude oil that was not subject to the upper tier ceiling price was sold at the "uncontrolled price." Crude oil from a particular field would normally have two or three different prices because the oil would be subject to different regulations.

The district court made the following finding of fact:

> The term "upper-tier price," as used in the May 19, 1977 agreement, is unambiguous. Upper-tier ceiling prices are specific ceiling prices established by DOE regulations and computed by a formula set forth in those regulations. 10 C.F.R. § 212.74(b) (1977 and 1980). Posted upper-tier prices are prices at or below upper-tier ceilings prices, published in price bulletins issued by major oil companies. The term "upper-tier price" does not mean uncontrolled market prices posted for crude oil released by the government from price controls.

The district court's finding was correct.[3]

C. *Extrinsic Evidence*

The district court found that the contract was intended to be "a final and complete expression" of the parties'

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[3] Tenneco challenges the district court's finding on two grounds. First, Tenneco argues that the district court incorrectly assumed that the "upper tier price" was defined in the regulations. This argument misstates the district court's findings. The district court did not find that "upper tier price" meant "upper tier ceiling price." Instead, the district court correctly found that the "upper tier price" was the price at which crude oil subject to the "upper tier ceiling price" was sold.

Second, Tenneco argues that "in 1980, there existed two prices for oil still defined as upper tier—a lower restricted price for oil still subject to controls and a higher unrestricted price for oil released from controls." This argument is incorrect. "New" crude oil and "upper tier crude oil" are not synonymous. It is true that two prices existed for "new" crude oil: the "upper tier price" and the "uncontrolled price." For any particular field, however, only one "upper tier price" existed.

agreement. As a result, section 2-202 of the Uniform Commercial Code governs the interpretation of the agreement:

> Terms . . . which are . . . set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Tex. Bus. & Com. Code Ann. § 2.202. Tenneco does not contend that the record reflects the existence of "consistent additional terms" within the meaning of section 2-202(b). Instead, Tenneco argues that the record reveals the existence of a course of dealing and a course of performance contrary to the district court's findings. Section 2-208(2) states:

> The express terms of the agreement and any . . . course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade . . . .

Tex. Bus. & Com. Code Ann. § 2.208(b). Section 2-208 (2) is liberally applied to allow the admission of extrinsic evidence that is reasonably consistent with the express

terms of the contract. *Modine Manufacturing Co. v. North East Independent School District*, 503 S.W.2d 833, 840 (Tex. Civ. App. 1973); *see Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 794-805 (9th Cir. 1981) (applying Hawaii law); Hawkland, *Sales Contract Terms Under the UCC*, 17 UCC L.J. 195, 208-17 (1985).[4]

To avoid the prohibition contained in section 2-208(2), Tenneco must show that the extrinsic evidence "explains" or "supplements" the express terms of the contract. The extrinsic evidence cited by Tenneco does not show that "upper tier price" has a meaning different from the meaning found by the district court. As a result, the extrinsic evidence does not "explain" that term. The remaining inquiry is whether the extrinsic evidence "supplements" the contract. To be admissible under that theory, the extrinsic evidence must tend to show that the parties intended for Tenneco to charge the highest available market place without the need to negotiate with

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[4] Tenneco makes the following assertion: "No extrinsic evidence was considered. The district court excluded all such evidence—including evidence of course of dealing, usage of trade, and course of performance—because it found the term 'upper tier price' unambiguous." While Tenneco's relies heavily on that premise, in fact it is false. Initially, it is apparent that the district court relied on trade usage evidence in determining the meaning of "upper tier price." Moreover, the record reveals that the district court admitted a substantial amount of extrinsic evidence. Conclusion of Law No. 5 states, in pertinent part:

> As the May 19, 1977 agreement was intended by the parties to be a final and complete expression of the agreement, and as the parties' intent as to price is clear from the four corners of the contract, *as well as from the testimony of those who negotiated and drafted the agreement,* extrinsic evidence is not admissible to contradict its express price terms.

(emphasis added). The district court evidently concluded that the bulk of the extrinsic evidence introduced by Tenneco contradicted the express terms of the contract. Under section 2-208(2), such evidence is inadmissible.

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(emphasis added). The district court evidently concluded that the bulk of the extrinsic evidence introduced by Tenneco contradicted the express terms of the contract. Under section 2-208(2), such evidence is inadmissible.

Kern Oil in the event of deregulation. *See Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 7-10 (4th Cir. 1971) (requiring the admission of evidence showing that, in the fertilizer industry, quantity terms in contracts are "mere projections") (applying Virginia law); Duesenberg, *Sales, Bulk Transfers, and Documents of Title*, 38 Bus. Law. 1109, 1112-14 (1983). A careful review of the record reveals that Tenneco's extrinsic evidence did not meet that requirement.

Initially, Tenneco argues that the district court improperly excluded evidence relating to the prior course of dealings between Tenneco and Kern Oil. In fact, the evidence that was excluded related to the negotiation of a single prior contract. "[A] single transaction cannot constitute a course of dealing." *International Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983) (applying Texas law); *see* U.C.C. § 2-208 comment 4 (noting that a "single occasion of conduct" does not establish a course of performance). Moreover, Tenneco's witnesses indicated that the 1977 contract fully reflected the parties' agreement.[5] Accordingly, the district court properly excluded the evidence relating to the prior transaction.

Tenneco also asserts that the record shows four occasions on which Tenneco sold crude oil to Kern Oil at prices higher than those authorized by the contract. Tenneco claims that this evidence establishes a course of performance. In fact, the record reveals that each price variation was negotiated.[6] Accordingly, the four occa-

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[5] During oral argument before us, counsel for Tenneco conceded that the parties did not contemplate the effect of deregulation during the negotiation of the contract in 1977.

[6] Tenneco argues that the price variations were not actually negotiated. At the very least, however, Kern Oil's management was formally notified of the price change. By acquiescing in the price variations, Kern Oil's management effectively authorized a modification of the contract. *See* Tex. Bus. & Com. Code Ann. §§ 2.201 (c) (3), 2.209 (a).

sions cited by Tenneco do not establish a course of performance contrary to the district court's findings. *See Jon-T Chemicals, Inc. v. Freeport Chemical Co.*, 704 F.2d 1412, 1416 n.5 (5th Cir. 1983) (applying Texas law).

Finally, Tenneco argues that Kern Oil's payment of the invoices in 1980 establishes a course of performance. To the extent that Kern Oil acted under a mistake of fact, however, its payment of the invoices cannot constitute a course of performance. The mistake of fact issue is discussed below.[7]

III

Kern Oil's Mistake

A. *Standard of Review*

The district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52 (a); *see Anderson v. City of Bessemer City*, 105 S.Ct. 1504 (1985); *Allen v. Steele*, 759 F.2d 1469, 1470 (9th Cir. 1985). Tenneco asserts that the district court adopted Kern Oil's proposed findings of fact "virtually verbatim." In such a case, the clearly erroneous standard applies, although "close scrutiny" of the record is appropriate. *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

B. *The Existence of a Mistake*

The district court entered lengthy findings of fact regarding the existence of a mistake. The district court

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[7] In 1980, Tenneco charged Kern Oil the uncontrolled price for shipments of "heavy" crude oil. Tenneco attempted to introduce that fact into evidence, arguing that Kern Oil's failure to object to the charge for heavy crude oil established a course of performance. The district court properly excluded the evidence as irrelevant. The fact that Kern Oil decided not to seek restitution of a particular overpayment does not establish a course of performance.

found that Kern Oil's senior management did not become aware of Tenneco's pricing decision until December 1980 and that Kern Oil's accounting department had paid the invoices mechanically, relying on Tenneco's assertion that the crude oil was "newly discovered" or "upper tier released." The district court's findings are thoroughly supported by the record.

Tenneco argues at great length that the district court's findings are wrong. It is apparent that the record contains a great deal of evidence that could be interpreted in more than one way. Nevertheless, the district court's conclusion that the record supported Kern Oil's position was not clearly erroneous.

C. *Mistake of Fact vs. Mistake of Law*

Under Texas law, it is well settled that, "even though [a party to a contract] was under no legal obligation to make the overpayments, if the money was voluntarily paid, with full knowledge of all the facts, it cannot be recovered." *Gulf Oil Corp. v. Lone Star Producing Co.*, 322 F.2d 28, 31 (5th Cir. 1963) (applying Texas law); *see Pennell v. United Insurance Co.*, 150 Tex. 541, 243 S.W.2d 572, 576 (1951); 3 G. Palmer, *supra*, § 14.27. The district court found that Kern Oil made a mistake of fact, rather than a mistake of law. Finding of Fact No. 27 states, in pertinent part:

> Kern's payment of the uncontrolled market price invoices for January through October 1980 deliveries was a mistake. It was not made voluntarily or with the intention to waive Kern's contractual rights. Kern did not knowingly acquiesce in Tenneco's charging prices above the contract price.

The district court found that Kern Oil's accounting staff was not aware that the uncontrolled price was improper and that Kern Oil's senior management was not aware that Tenneco was charging the uncontrolled price until December, 1980. Accordingly, no single person at Kern

Oil had the requisite knowledge to render the payment a mistake of law. As noted above, these findings were not clearly erroneous.

The district court's findings raise a single issue of law: whether Kern Oil can assert that the payments were made under a mistake of fact when its employees collectively knew all of the relevant facts. Tenneco argues that the knowledge of different employees of a business entity must be imputed to the entity. Under Texas law, Tenneco is incorrect. Before a mistake of law will be found, "the overpayments must have been truly voluntary, that is, 'done by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will.' There must appear 'an intention on the part of the payor to waive his rights.'" *Gulf Oil*, 322 F.2d at 31 (citations omitted). Under the district court's findings of fact, it cannot be said that Kern Oil intended to waive its rights. Accordingly, the district court properly concluded that Kern Oil committed a mistake of fact. *See id.* at 32-33 (finding a mistake of fact when a corporation's accounting department paid an invoice with excessive charges); 3 G. Palmer, *supra*, § 14.8, at 175 ("Carelessness of the payor is not a sufficient reason for denying recovery of the unjust gain.").

Tenneco cites several cases in support of its position. Most of those cases stand for the well established rule that notice to an agent constitutes notice to the principal. *Central Airlines, Inc. v. Kahle*, 419 S.W.2d 873, 876 (Tex. Civ. App. 1967) (service of process); *Pyramid Drilling Co. v. Howell*, 173 S.W.2d 250, 252 (Tex. Civ. App. 1043) (formation of corporation); *United States Fidelity & Guaranty Co. v. San Diego State Bank*, 155 S.W.2d 411 (Tex. Civ. App. 1941) (administration of guardianship). If Tenneco had notified Kern Oil's accounting department that it was changing the price of the crude oil, those cases would control. Instead, Tenneco unilaterally altered the price without notice.

Tenneco also cites *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-39 (W.D. Va. 1974), in which the court held that a corporation could be held criminally responsible for the collective knowledge of its employees. The corporation had a duty to insure that its drivers obeyed a federal regulation. Various employees had notice of facts that, taken together, revealed that the drivers were violating the regulation. The holding that the corporation was charged with knowledge of the violations was thus based on the corporation's legal duty to prevent the violations. Such a duty is not present in this case.

Tenneco relies heavily on *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*, 625 S.W.2d 295 (Tex. 1981). The issue in *Preston Farm* was whether a buyer had agreed to pay a service charge for late payments on certain debts. The buyer admitted at trial that he agreed initially to the service charges to his account until he found out that too much interest was being charged. *Id.* at 298. Moreover, the bookkeeper was authorized by the buyer to make any payments required by the seller's invoices, which included the service charge provision. The invoices sent by the seller to the buyer's bookkeeper included a column conspicuously stamped "service charge." The court held that the bookkeeper's knowledge of the service charge was imputed to the buyer. *Id.* at 300.

Preston Farm is distinguishable from the present case. In contrast with *Preston Farm*, Kern Oil's management never expressly agreed to any change in the contract price. Furthermore, because Tenneco's invoices stated that the charges were "per contract of May 19, 1977," Kern Oil's accounting department did not even know that Tenneco was changing the price. There was no knowledge of any change in price to be imputed to Kern Oil's senior management. Unlike the bookkeeper in *Preston Farm*, Kern Oil's accounting department paid the invoices under a mistake of fact.

D. *Estoppel*

Tenneco argues that Kern Oil is estopped from seeking restitution because Tenneco relied on Kern's payments. Specifically, Tenneco asserts that it would have cancelled the Kern Oil contract if it had known that it could charge only the upper tier price. Detrimental reliance is an affirmative defense. *See Tomlinson v. Lackey*, 555 S.W.2d 810, 813 (Tex. Civ. App. 1977); Fed. R. Civ. P. 8(c). Accordingly, the burden of proof was on Tenneco. *See Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981); *Insurance Co. of North America v. McCleave*, 462 F.2d 587, 588 (3d Cir. 1972). Tenneco failed to produce evidence showing that it would have cancelled the contract if it knew that the price was limited to the upper tier price. The district court's finding that Tenneco failed to establish detrimental reliance was not clearly erroneous.[8]

IV

Dependent Covenants

Under the contract, Kern Oil and Tenneco were obligated to sell each other 3,000 barrels of crude oil per day at the lower tier price. The purpose of this provision was

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[8] Tenneco argues, however, that the district court erred by excluding evidence that would have shown detrimental reliance. Initially, Tenneco notes that the district court excluded testimony regarding the ultimate decision to terminate the contract in late August 1980. The record contains no indication that the witness would have testified that Tenneco would have cancelled the contract earlier if it had known that the price was limited. Tenneco also notes that the district court excluded testimony showing that a particular witness would have been willing to pay the uncontrolled price for Tenneco's crude oil. Tenneco asserts that this shows the existence of willing buyers. In fact, the excluded testimony was cumulative. The record contains substantial evidence regarding the market price for various types of crude oil. A market price is the price that willing buyers will pay and that willing sellers will accept. As a result, the market price data in the record shows the existence of willing buyers. In any event, the existence of willing buyers does not prove that Tenneco would have cancelled the contract.

to save transportation costs: Kern Oil purchased California oil from Tenneco and Tenneco purchased West Texas Oil from Kern Oil. Sales of crude oil by Tenneco in excess of 3,000 barrels per day were at the upper tier price. Kern Oil was unable to sell Tenneco 3,000 barrels per day on a consistent basis. Tenneco asserts that Kern thus breached the contract. Tenneco argues that the covenants in the contract were dependent, so that Kern Oil's breach bars recovery from Tenneco. The record reveals, however, that Tenneco waived any breach by Kern Oil. While Tenneco could have cancelled the contract, it instead continued shipping oil to Kern Oil "per contract dated May 19, 1977." Accordingly, Tenneco cannot assert Kern's nonperformance in defense of its own breach. *See Mandril v. Kasishke*, 620 S.W.2d 238, 245 (Tex. Civ. App. 1981); *cf.* Tex. Bus. & Com. Code Ann. § 2.612(c) (stating that a breached installment contract is reinstated "if [the aggrieved party] accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments").

V

Attorneys' Fees

A. *Availability*

In a diversity case, the availability of attorneys' fees is governed by state law. *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985). The relevant Texas statute states:

> Any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation . . . founded on oral or written contracts, may present the same to such persons or corporation or to any duly authorized agent thereof; and if, at the expiration of 30 days thereafter, payment for the just amount owing has not been tendered, the claimant may, if represented by an attorney, also

> recover, in addition to his claim and costs, a reasonable amount as attorney's fees . . . . This Act shall be liberally construed to promote its underlying purposes.

Tex. Rev. Civ. Stat. Ann. art. 2226.

Tenneco argues that attorneys' fees were not available because Kern Oil failed to plead entitlement to attorneys' fees. Tenneco is incorrect. The pretrial order listed the availability of attorneys' fees as a contested issue of law and stated that it superseded the pleadings. *See* Fed. R. Civ. P. 16(e) ("This [pretrial] order shall control the subsequent course of the action unless modified by a subsequent order."). Without objection by Tenneco, Kern Oil introduced evidence showing that the claim had been presented to Tenneco in accordance with Article 2226. Accordingly, the attorneys' fee issue was properly raised.

B. *Calculations*

Tenneco argues that the district court's findings were inadequate under the standards of this court for the setting of attorneys' fee awards. *See Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). Tenneco is incorrect. Article 2226 states:

> The usual and customary fees . . . shall be presumed to be reasonable, but such presumption may be rebutted by competent evidence. In a proceeding before the court, . . . the court may in its discretion take judicial notice of the usual and customary fees in such matters and of the contents of the case file without receiving further evidence.

Accordingly, the standards set forth in *Kerr* do not apply under Texas law. The extensive documentation submitted by Kern Oil supports Judge Real's determi-

nation. Accordingly, the record does not reveal an abuse of discretion.

VI

Dismissal of Count IV

Tenneco sought a dismissal of Count IV under Federal Rule of Civil Procedure 41(a)(2), which states: "[After the filing of an answer], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." The district court denied Tenneco's motion. When Tenneco refused to go forward, the district court dismissed the action under Rule 41(b), which states:

> For failure of the plaintiff to prosecute . . ., a defendant may move for dismissal of an action or of any claim against him. . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication on the merits.

The district court entered findings of fact and conclusions of law in support of the dismissal. *See Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Tenneco argues that the district court erred by refusing to dismiss without prejudice under Rule 41(a)(2).

A. *Standard of Review*

"The Ninth Circuit has long held that the decision to grant a voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the District Court, and its order will not be reversed unless the District Court has abused its discretion." *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982);

see Purer & Co. v. Aktiebolaget Addo, 410 F.2d 871, 879 (9th Cir.), *cert. denied*, 396 U.S. 834 (1969). When the plaintiff takes a dismissal with prejudice under Rule 41(b) to challenge the denial of a dismissal without prejudice under Rule 41(a)(2), the plaintiff proceeds "at its peril." *Blue Mountain Construction Co. v. Werner*, 270 F.2d 305, 307 (9th Cir. 1959), *cert. denied*, 361 U.S. 931 (1960).

B. *Forum Shopping*

The district court found that "Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and this Court and having the same claim heard by Judge Waters; thus, they constitute impermissible forum shopping." Tenneco argues that the district court was wrong. Count IV involves the failure of Kern Oil to supply crude oil to Tenneco. The cases pending before Judge Waters involve other issues related to the supply of crude oil under the May 19, 1977 contract. Tenneco asserts that its sole motivation in seeking a voluntary dismissal was to consolidate all of the "supply" cases. The flaw in Tenneco's argument is that Count IV was a compulsory counterclaim in the "price" case before Judges Marshall and Real. *See* Fed. R. Civ. P. 13(a). If Judge Marshall had dismissed Count IV without prejudice, the final judgment entered by Judge Real would have barred the litigation of the issues raised in Count IV. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 276 n.4 (9th Cir. 1980). Accordingly, Tenneco's justification for seeking a voluntary dismissal was baseless.

The circumstances of this case support the district court's finding that Tenneco was forum shopping. Tenneco states that Judge Waters had come close to granting summary judgment for Tenneco in a related action.

Judge Marshall, on the other hand, granted summary judgment for Kern Oil on Count IV. Tenneco did not request a voluntary dismissal until *after* the granting of summary judgment. When Judge Marshall informed the parties that the case would be transferred to another judge for trial, Tenneco unsuccessfully sought permission to delay filing a motion for reconsideration of the summary judgment until the new judge was named. After Judge Real entered judgment for Kern Oil in the price case, Tenneco refused to try Count IV before Judge Real. Tenneco's filings emphasize Tenneco's desire to litigate Count IV before Judge Waters. In light of these circumstances, the district court was justified in finding that Tenneco was forum shopping.

Tenneco also asserts that Judge Real scheduled the trial of Count IV so quickly that Tenneco could not have been prepared. It is true that Judge Real denied Tenneco's request for a continuance. We note, however, that Tenneco has not appealed that ruling. While lack of time to prepare could justify a continuance, it does not justify a voluntary dismissal.

C. *Jurisdiction*

Conclusion of Law No. 2 states:

> This Court does not have jurisdiction to overrule Judge Marshall's Order denying Tenneco's motion for "non-suit," *i.e.*, voluntary dismissal without prejudice, of Count IV. Tenneco's *ex parte* application to this Court for voluntary dismissal without prejudice of Count IV constitutes an impermissible "horizontal appeal" of Judge Marshall's decision.

The district court was incorrect. While it is true that district courts do not normally overrule each other after a case is transferred, that rule is prudential, rather than jurisdictional. *See, e.g., Wilson v. Ohio River Co.*, 236 F. Supp. 96, 98 (S.D.W. Va. 1964), *aff'd*, 375 F.2d

775 (4th Cir. 1967). As a result, Judge Real had jurisdiction to review Judge Marshall's order. Nevertheless, Judge Marshall's ruling was entitled to deference.

D. *Prejudice to Kern Oil*

The district court considered the prejudice to Kern Oil in Finding of Fact No. 25:

> Kern would be prejudiced by a voluntary dismissal of Count IV without prejudice because of, *inter alia*, the extensive discovery taken in this case, the burden of duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial on August 20, and the fact that Count IV arising out of the contracts before the court in the first trial make Count IV a compulsory counterclaim in this case.

The district court's findings are supported by the record, although the extent of the prejudice to Kern Oil is questionable. *Cf. Hamilton*, 679 F.2d at 145 (holding that the defendant had not established sufficient prejudice from the granting of a voluntary dismissal "merely by asserting that it had begun trial preparations").

E. *Summary*

It is apparent from the record that the handling of the various actions between Tenneco and Kern Oil was less than ideal. It would have been appropriate to consolidate the various actions under Fed. R. Civ. P. 42(a). Nevertheless, Tenneco had little justification for refusing to try Count IV before Judge Real. In light of Judge Real's findings of fact, we conclude that the dismissal of Count IV did not constitute an abuse of discretion.

VII

Conclusion

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 81-0791 MLR (JRx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Filed Sep. 4, 1984]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING COUNT IV OF TENNECO OIL COMPANY'S COUNTERCLAIM

The application of Tenneco Oil Company for voluntary dismissal of Count IV of its Counterclaim without prejudice having been heard on August 20 and 22, 1984, and Count IV having come on regularly for trial before this

Court on August 22, 1984, the Honorable Manuel L. Real, Chief Judge, presiding, and the Court having considered the briefs of the parties, the oral argument and statements of counsel, and all pleadings, papers and other records on file in this case,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. *FINDINGS OF FACT.*

1. To the extent these Findings of Fact are deemed Conclusions of Law, they are incorporated into the Conclusions of Law.

2. This action is one of three related lawsuits pending in the Central District of California between Kern Oil & Refining Co. ("Kern") and Tenneco Oil Company ("Tenneco"). Tenneco first filed its lost profits counterclaim on August 17, 1981 as Count IV in this case. Subsequently, it filed the same counterclaim on March 16, 1983 in Case No. 82-6875 and on March 17 in Case No. 81-3253, and filed it again on December 15, 1983 after those cases had been consolidated before Judge Laughlin E. Waters.

3. Tenneco filed Count IV of its Counterclaim in this case as a compulsory counterclaim.

4. Count IV of Tenneco's Counterclaim herein appears to arise out of and involve the circumstances of Kern's shortfalls in deliveries of West Texas and New Mexico crude oil to Tenneco and the impact on Tenneco.

5. The discovery cutoff date in this case was set for September 1, 1983, after Tenneco opposed the motion of Kern's new counsel, O'Melveny & Myers (who had been retained in June 1983), for an extension of the discovery period to September 20, 1983. The discovery taken between August 1981, when Count IV was filed by Tenneco, and September 1, 1983, the discovery cutoff date, was

extensive. Tenneco has never sought to reopen discovery.

6. On September 16, 1983, Kern moved for summary judgment dismissing Count IV based on the force majeure clause of the applicable contracts between the parties. Tenneco opposed Kern's motion by affidavits, not seeking a continuance for additional discovery under Fed. R. Civ. P. 56(f), and filed a cross-motion for summary judgment based on the alleged inapplicability of the same force majeure clause.

7. In mid-February 1984 the parties filed their respective pretrial Memoranda of Contentions of Fact and Law in which they addressed, *inter alia*, Count IV.

8. On February 13, 1984 Judge Consuelo B. Marshall, before whom this case was then pending, granted Kern's summary judgment motion and denied Tenneco's cross-motion.

9. In March 1984 Tenneco moved for reconsideration of Judge Marshall's February 13 Order dismissing Count IV and, conditioned upon the granting of its motion for reconsideration, moved for the first time for voluntary dismissal without prejudice ("non-suit") of Count IV. Tenneco could have moved for dismissal of Count IV without prejudice at least as early as March 1983, the time when it filed its lost profits counterclaim in Cases Nos. 82-6875 and 81-3253. However, Tenneco did not seek dismissal until after Judge Marshall had ruled adversely to it, and in its motion for "non-suit" Tenneco stated that it had pursued its lost profits counterclaim in this case because it considered that claim a compulsory counterclaim and because this case was set to go to trial earlier than the cases pending before Judge Waters.

10. In May 1984 Judge Marshall transferred this case to this Court for trial. Trial was held from June 8-19 on the claims then remaining at issue—the First

and Second Causes of Action of the First Amended Complaint and Counts I, III, and V of the Counterclaim—and on July 31, 1984 judgment was entered for Kern on all claims tried. Count IV of the Counterclaim was not tried at that time because Judge Marshall's summary judgment dismissing Count IV still stood.

11. In June 1984, after the conclusion of trial, this Court and the parties received notice that Judge Marshall had ruled on Tenneco's motion for reconsideration, vacating her earlier decision and reinstating Count IV for trial on the merits. Judge Marshall did not, however, rule at that time on the motion for "non-suit."

13. On July 30, 1984 this Court issued an order setting "the Force Majeure Issue" for trial on August 20.

14. On August 3, 1984 Judge Marshall entered an Order denying Tenneco's motion for "non-suit."

15. On August 6 upon Kern's *ex parte* application for clarification of this Court's July 30 Order, this Court issued an order stating that it would try all issues relating to Count IV at the trial on August 20 and scheduling dates for submission of various pretrial papers.

16. On August 10 the parties submitted a stipulation and proposed order adjusting the dates for submission of various pretrial papers.

17. On August 13 Tenneco filed an *ex parte* application to this Court, again seeking to be allowed to dismiss Count IV without prejudice and asking, in the alternative, for a continuance of the August 20 trial date. On that same day, Kern filed opposition to Tenneco's *ex parte* application.

18. On August 16 the parties filed a second joint supplemental exhibit list (supplementing those previously filed in February and April 1984), separate witness lists, trial briefs, separate proposed pretrial conference orders, and explanatory declarations. Although Tenneco's proposed pretrial conference order failed to list

any issues of fact remaining to be litigated, the factual and legal issues that were to be tried are fairly stated in paragraphs 7 and 8 of Kern's proposed pretrial conference order.

19. On August 20 pursuant to this Court's August 6 order, 37 volumes of deposition testimony on which the parties intended to rely at trial (marked and countermarked in accordance with Local Rule 9.4.9) were lodged with the Court's clerk.

20. On August 20, the date set for trial, the parties appeared before this Court. Tenneco raised the issue of its pending application for voluntary dismissal of Count IV without prejudice or for a continuance. After considering the briefs and oral argument of the parties, this Court denied Tenneco's application and instructed counsel that trial would commence on August 22 or 23, at the conclusion of a priority criminal matter. Relying on Fed. R. Civ. P. 1, the Court also denied Tenneco's oral request for certification of the Court's denial under 28 U.S.C. § 1292(b).

21. In the late afternoon of August 20, Tenneco filed with the United States Court of Appeals for the Ninth Circuit emergency petitions for a writ of mandamus or prohibition and for a stay pending determination of the writ petition, requesting that Court to compel this Court to vacate its order setting Count IV for trial and to dismiss Count IV without prejudice. Kern filed its opposition with the Ninth Circuit the following morning, August 21, to which Tenneco filed a reply, and late that afternoon the Court of Appeals issued an order denying Tenneco's emergency petition for a stay.

22. On August 22, the date set for trial, the parties appeared before the Court. Tenneco stated that it was defaulting and renewed its request that it be allowed to dismiss Count IV without prejudice. In response to this Court's question whether Tenneco intended to refile its counterclaim, counsel for Tenneco, speaking as an Offi-

cer of the Court, stated that Tenneco intended to prosecute the lost profits counterclaim in the cases before Judge Waters where the same claim is pending. This Court again denied Tenneco's request for dismissal without prejudice.

23. On August 22, after denying Tenneco's request for dismissal without prejudice, the Court asked Tenneco's principal trial counsel if he wished to make an opening statement. Tenneco's counsel responded that his client had advised him that he had "no authority to proceed" or to "put on any evidence." He added that he had "no witnesses," "no documents," and "no authority at this time at all from Tenneco to participate in any trial." Upon motion by counsel for Kern, this Court granted judgment on the merits of Count IV in favor of Kern and dismissed Count IV with prejudice to Tenneco, pursuant to Fed. R. Civ. P 41(b) and Local Rule 27.

24. Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and this Court and having the same claim heard by Judge Waters; thus, they constitute impermissible forum shopping.

25. Kern would be prejudiced by a voluntary dismissal of Count IV without prejudice because of, *inter alia*, the extensive discovery taken in this case, the burden of potential duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial on August 20, and the fact that Count IV arising out of the contracts before the court in the first trial make Count IV a compulsory counterclaim in this case. Because this Court is already familiar with some of the issues to be tried regarding the lost profits counterclaim, it would be against the interests of the economies of the parties and judicial economy to allow dismissal of Count IV without prejudice.

27. Tenneco would not be prejudiced by having to litigate Count IV in this case because it has had, *inter alia*, ample opportunity to conduct discovery into the facts of the lost profits counterclaim, adequate notice of the issues to be tried, and sufficient opportunity to prepare for trial.

B. *CONCLUSIONS OF LAW*

1. To the extent these Conclusions of Law are deemed Findings of Fact, they are incorporated into the Findings of Fact.

2. This Court does not have jurisdiction to overrule Judge Marshall's Order denying Tenneco's motion for "non-suit," *i.e.*, voluntary dismissal without prejudice, of Count IV. Tenneco's *ex parte* application to this Court for voluntary dismissal without prejudice of Count IV constitutes an impermissible "horizontal appeal" of Judge Marshall's decision.

3. Even if this Court had jurisdiction to decide Tenneco's application for dismissal without prejudice, on the facts of this case Tenneco is not entitled to such a dismissal.

4. Tenneco's lost profits counterclaim is a compulsory counterclaim under Fed. R. Civ. P. 13(a).

5. Due to Tenneco's failure and refusal to begin trial of Count IV on August 22, Kern is entitled to judgment on the merits and dismissal of Count IV of the Counterclaim with prejudice to Tenneco pursuant to Fed. R. Civ. P. 41(b) and Local Rule 27.

DATED: Sept. 4, 1984.

/s/ Manuel L. Real
The Honorable Manuel L. Real,
Chief Judge, United States
District Court

Submitted by

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

by /s/ Richard E. Sherwood
Attorneys for Plaintiff and
Counter-Defendant Kern Oil
& Refining Co.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 81-0791 MLR (JRx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Filed Sep. 4, 1984]

ORDER AND JUDGMENT ON COUNT IV OF COUNTERCLAIM

Count IV of the Counterclaim of defendant and counter-claimant Tenneco Oil Company ("Tenneco") came on for trial on August 22, 1984, the Honorable Manuel L. Real, Chief Judge, presiding, and counsel for Tenneco having represented to the Court at commencement of trial that Tenneco had instructed counsel to

enter Tenneco's default and not to proceed with trial of Count IV,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Count IV of Tenneco's Counterclaim is dismissed with prejudice pursuant to Fed. R. Civ. Proc. 41(b) and Local Rule 27.2. Tenneco is to take nothing on Count IV of the Counterclaim.

2. Judgment on the merits is granted in favor of plaintiff and counterdefendant Kern Oil & Refining Co. ("Kern") on Count IV of the Counterclaim. Kern is to recover its costs of action, $————, from Tenneco.

3. There is no just reason for delay in allowing this Judgment to be appealed, and the Clerk of the Court is hereby directed, pursuant to Fed. R. Civ. P. 54(b), to enter final judgment forthwith as to Count IV of the Counterclaim, in accordance with the terms hereof.

/s/ Manuel L. Real
The Honorable Manuel L. Real
Chief Judge, United States
District Court

DATED: Sept. 4, 1984

Submitted by

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

By /s/ Richard E. Sherwood
Attorneys for Plaintiff and
Counter-Defendant Kern Oil
& Refining Co.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. Nos. 84-6268
84-6367
84-6482

D.C. No. CV 81-0791-R

KERN OIL AND REFINING CO.,
Plaintiff/Counter-Defendant-Appellee,

vs.

TENNECO OIL CO.,
Defendant/Counterclaimant-Appellant.

[Filed Sept. 11, 1986]

ORDER

Before: ANDERSON, BEEZER and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-365

TENNECO OIL CO.,

Applicant,

v.

KERN OIL AND REFINING CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including January 9, 1987.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 13th day of November, 1986.

APPENDIX F

TENNECO INC.
SUBSIDIARIES AND AFFILIATES
As of August 31, 1986

TENNECO INC. (Delaware)	
Agricultural & Industrial Management, Inc. (Delaware)	100%
Albright & Wilson Inc. (Delaware)	100
Brake-Pro Systems Inc. (Delaware)	100
Channel Industrial Sales Company (Delaware)	100
DeKoven Manufacturing Co. (Wisconsin)	100
East Tennessee Natural Gas Company (Tennessee)	100
Eastern Insurance Company Limited (Bermuda)	100
ERCO Industries Inc. (Delaware)	100
Gas Ships, Inc. (Delaware)	100
Houston Oil & Minerals Corporation (Nevada)	100
Houston Oil & Minerals Exploration Company (Texas)	100
Houston Oil & Minerals Products Company (Texas)	100
Houston Oil International, Inc. (Texas)	100
HOCOL, S.A. (Cayman Islands)	100
J. I. Case GmbH (Germany)	100
J. I. Case S.A. (France)	100
Compagnie Internationale des Machines Agricoles Et de Genit Civil (Morocco)	50
Etablissement Lacroix S.A. (France)	100
Etablissement L. Bouilloux S.A. (France)	98
International Harvester Belgium N.V. (Belgium)	100
Societe Anonyme Immobiliere (Morocco)	50
Poclain S.A. (France)	44
Agencias Petroleras, Ltda. (Colombia)	100
Tenneco Espana SA (Spain)	100
Marchon Surfac S.A. (Spain)	100
Tenneco Petrole Gabon, S.A. (Cayman Islands)	100
Tenneco Pongara Gabon, S.A. (Cayman Islands)	100
Houston Oil & Minerals of Colombia, Inc. (Texas)	100

Houston Oil & Minerals of Dubai, Inc. (Texas)	100%
Houston Oil & Minerals of The Netherlands, Inc. (Texas)	100
Houston Oil & Minerals of Tunisia, Inc. (Texas)	100
Houston Oil & Minerals U.K., Inc. (Texas)	100
LaTerre Colombia, S.A. (Cayman Islands)	100
Tenneco Oil & Minerals of UMM AL-QAIWAIN (Texas)	100
Tenneco Oil of Gabon, Inc. (Texas)	100
Houston Production Company (Texas)	100
Houston Royalty Company (Nevada)	100
Magrange Inc. (Texas)	100
Intake Water Company (Delaware)	100
Kern River Corporation (Delaware)	100
Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Kern River Service Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Lakefront Manufacturing, Inc. (Delaware)	100
Land Ventures Inc. (Delaware)	100
Lorneterm LNG Limited (Canada)	100
Midwestern Gas Transmission Company (Delaware)	100
Midwestern Gas Marketing Company (Delaware)	100
Monroe Auto Equipment Company (Delaware)	100
E-Z Ride Shock Absorber Company (Michigan)	100
Monroe Argentina S.A.I.C. y F. (Argentina)	100
Monroe Auto Equipment France S.A. (France)	100
Monroe Auto Equipment GmbH (Germany)	100
Monroe do Brasil Industria E Comercio Ltda. (Brazil)	100
Monroe Auto Pecas S.A. (Brazil)	80
Monroe Japan Co., Ltd. (Japan)	100
Regal Ride Shock Absorber Company (Michigan)	100
Sudinpar Holding Etablissement (Liechtenstein)	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)	100
Tenneco Automotive International Sales Corporation (Delaware)	100
New Tenn Company (Delaware)	100
Northeastern Gas Transmission Company (Delaware)	100

Seahorse Offshore Transmission Company (Delaware)	100%
Shipping Ventures Inc. I (Delaware)	100
Shipping Ventures Inc. II (Delaware)	100
Shipping Ventures Inc. III (Delaware)	100
State Gas Pipeline Company (Delaware)	100
Tenneco Alaska, Inc. (Delaware)	100
Tenneco China Trade Inc. (Delaware)	100
Tenneco United Company (a Texas General Partnership) (Tenneco China Trade, Inc. has 50% ownership and Indamerica International, Inc., a California corporation, has 50% ownership.)	
Tenneco Coal Company (Delaware)	100
Tenneco Communications Corporation (Delaware)	100
Tenneco Corporation (Delaware)	100
Bloor Automotive Inc. (Delaware)	100
Discoverer Services, Inc. (Delaware)	100
Blue Flame Gas Corporation (Delaware)	100
Car-X Service Systems, Inc. (Delaware)	100
Channel Industries Gas Company (Delaware)	100
Collins Pipeline Company (Delaware)	100
Columbine Casualty Company (Colorado)	100
G & T Pipeline Company (Delaware)	100
International Sourcing and Countertrade Company (Delaware)	100
Kern County Land Company (Delaware)	100
Boquillas Cattle Company (Arizona)	100
J. I. Case Company (Delaware)	100
Case Engine Holding Company, Inc. (Delaware)	100
Consolidated Diesel Company (North Carolina Partnership)	100
(Case Engine Holding Company has 50% ownership as Partner) Consolidated Diesel, Inc. (Delaware)	100
Drott Manufacturing Company (Delaware)	100
Grand Detour Plow Company (Wisconsin)	100
Kase, S.A. De C.V. (Mexico)	100
J. I. Case Argentina, S.A. (Argentina)	100
J. I. Case Credit Corporation (Wisconsin)	100
J. I. Case Internatinal, S.A. (Venezuela)	100
J. I. Case Leasing Corporation (Wisconsin)	100

J. I. Case Mfg. Company, Inc. (Wyoming) 100%
J. I. Case Threshing Machine Company (Wisconsin) 100
Pryor Foundry, Inc. (Oklahoma) 100
Tenneco Canada Inc. (Ontario) 100
Dunville Mining Co. Limited (Alberta) 100
Electric Reduction Sales Co., Ltd. (Canada) 100
ERCO Industries of Canada Limited (Canada) 100
J. I. Case do Brasil & Cia. (Brazil) . 100
Case Capital Assets Management S/C Ltda. (Brazil) 100
Tenneco Credit Canada Corporation (Alberta) 100
The Case Company (Wisconsin) 100
Pueblo Del Sol Water Company (Arizona) 100
Tenneco West, Inc. (Delaware) 100
Ag-Ventures, Incorporated (California) . 100
Cal-Date Company (California) 100
California Almond Orchards, Inc. (California) 100
California Harvest Shops, Incorporated (California) 100
Grandma Mac's Orchard, Inc. (California) 100
H-M-T Inc. (California) 100
Heggblade-Marguleas-Tenneco, Inc. (California) 100
House of Almonds, Inc. (Delaware) 100
Kern County Land Company, Inc. (California) 100
Kern Island Water Company (California) 100
Kern River Canal and Irrigating Company (California) 98
Sun Giant Sales Corporation (California) 100
Tenneco Exploration, Ltd. (Texas Limited Partnership
(Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)
Tenneco Exploration, Ltd. II (Texas Limited Partnership)
(Tenneco Oil Company has 50% ownership as General Partner and Tenneco

West, Inc. has 50% ownership as Limited Partner)
Tenneco Farming Company (California) 100%
Tenneco Property Development Corporation (California) 100
LHC Pipeline Company (Delaware) 100
Marlin Drilling Co., Inc. (Delaware) 100
Bluefin Supply Company (Delaware) 100
Marlin International Drilling Company (Delaware) 100
Marlin Colombia Drilling Co. Inc. (Delaware) 100
Marlin-West Drilling Co., Inc. (Delaware) 100
Mitchell Supreme Fuel Company (Delaware) 100
Newport News Shipbuilding and Dry Dock Company (Virginia) 100
Asheville Industries Inc. (North Carolina) 100
Greeneville Metal Manufacturing, Inc. (Virginia) 100
The James River Oyster Corporation (Virginia) 100
Newport News Industrial Corporation (Virginia) 100
Newport News Industrial Corporation of Ohio (Ohio) 100
Newport News Offshore Systems Corporation (Virginia) 100
Newport News Reactor Services, Inc. (Virginia) 100
SBG Puerto Rico, Inc. (Puerto Rico) 50
Packaging Corporation of America (Delaware) 100
A&E Plastics, Inc. (Delaware) 100
Economy Printing & Lithographing Co. (Texas) 100
Ekco Products, Inc. (Illinois) 100
Alcan Ekco Limited (United Kingdom) 50
A/S Haustrup-Ekco Aluminum-Emballage (Denmark) 50
Plus Pack AB Svenska Haustrup-Ekco (Sweden) 100
Plus Pack A/S (Norway) 100
Plus Pack GmbH (Austria) 100
Plus Pack GmbH (Switzerland) 100
Ekco N.V. (Belgium) 100
Ekco GmbH (Germany) 100
Ekco S.A.R.L. (France) 100
Lake States Carriers, Inc (Illinois) 100

Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan) 50%
Skogstre A/S (Norway) 50
Tennessee River Pulp & Paper Company (Delaware) 100
The Corinth and Counce Railroad Company (Mississippi) 100
Petro-Tex Chemical Corporation (Delaware) 100
SWL Development Corp. (Texas) 100
Counce Limited Partnership (Texas Limited Partnership)
(SWL Development Corp. has 5% ownership as General Partner and Southwestern Life Insurance Company has 95% ownership as Limited Partner)
Counce Finance Corporation (Delaware) 100
SWL Security Corp. (Texas) 100
T & M Terminal Company (Delaware) 80
Tenneco Aviation Limited (Delaware) 100
Tenneco Credit Corporation (Delaware) 100
Tenneco Cogeneration Development Company (Delaware) 100
Tenneco Financial Services Inc. (Delaware) 100
Tenneco Asset Management Company (Delaware) 100
Tenneco Asset Planning Company (Delaware) 100
Tenneco Inc. (Nevada) 100
Tenneco Insurance Company (Delaware) 100
Philadelphia Life Insurance Company (Pennsylvania) 100
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Philadelphia Life Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)
HCT Oil and Gas Company (Delaware).... 100
LEDCO, Ltd. (Pennsylvania Limited Partnership)
(Philadelphia Life Insurance Company has 99% ownership as Limited Partner and One Independence Corporation has 1% ownership as General Partner)
Resource Oil and Gas Company (Delaware) 100

TINCO, Ltd. (Texas Limited Partnership)
(LEDCO, Ltd. has 43.3% ownership as Limited Partner and Tenneco Oil Company has 56.7% ownership as General Partner)
Multistate Oil Properties, Inc. (Delaware) 100%
Multistate Oil Properties N.V. (Netherlands Antilles) 100
One Independence Corporation (Delaware) 100
LEDCO, Ltd. (Pennsylvania Limited Partnership)
(One Independence Corporation has 1% ownership as General Partner and Philadelphia Life Insurance Company has 99% ownership as Limited Partner)
Philadelphia American Life Insurance Company (Pennsylvania) 100
American MedCAP, Inc. (Delaware) 100
Philadelphia Life Corporation (Pennsylvania) 100
Philadelphia Life Enterprises Inc. (Delaware) 100
Philadelphia National Life Insurance Company (Delaware) 100
San Francisco Life Insurance Company (California) 100
Philadelphia Life Asset Planning Company (Pennsylvania) 36
Tenneco Insurance Ventures Inc. (Delaware) 50
Southwestern Life Insurance Company (Texas) 100
Counce Limited Partnership (Texas Limited Partnership)
(Southwestern Life Insurance Company has 95% ownership as Limited Partner and SWL Development Corp. has 5% ownership as General Partner)
Counce Finance Corporation (Delaware) 100
Philadelphia Life Asset Planning Company (Pennsylvania) 64

Southwestern Insurance Holding Company (Delaware) 100%
LIG Chemical Company (Louisiana).. 100
Louisiana Intrastate Gas Corporation (Louisiana) 100
Mid Louisiana Gas Company (Delaware) 100
Sunbelt Gas Gathering Company (Delaware) 100
Security Trust Life Insurance Company (Georgia) 100
Nationwide Printing Company (Georgia) 100
Security Fire Insurance Company of Georgia (Georgia) .. 100
Tuscaloosa Pipeline Company (Louisiana) 100
SWL Re Life Insurance Company (Texas) 100
Tenneco Insurance Ventures Inc. (Delaware) 50
Tenneco Storage Limited Partnership (Louisiana Limited Partnership)
(Tenneco Oil Company has 50% ownership as General Partner and Southwestern Life Insurance Company has 50% ownership as Limited Partner)
Tenneco Storage Capital Corporation (Delaware) 100
Tenneco Minerals Company (Delaware) 100
Prometheus Minerals (Canada) Ltd. (Canada) 100
Tenneco Minerals Company of Australia, Inc. (Delaware) 100
Tenneco Oil & Minerals of Australia (Louisiana) Ltd. (Louisiana) 100
Tenneco Specialty Minerals Company (Delaware) 100
Windy Point Minerals, Ltd. (Canada) 100
Tenneco Oil Company (Delaware) 100
Caldyne, Inc. (Delaware) 100
Direct Oil Corporation of Texas (Texas)..... 100
FC Marine Inc. (Delaware) 75
(Skips A/S Tudor owns 25%)
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Philadelphia Life Insurance Company has 74%

ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)

GEO Oil and Gas Company of Houston (Delaware) 100%

Greene's Management Co., Inc (Georgia) 100

LaTerre Development Corp. (Delaware) 100

LaTerre Petroleum (U.K.), Inc. (Delaware) .. 100

Mistal, Inc. (Delaware) 51

Mont Belvieu Land Company (Delaware) 100

Operators, Inc. (Delaware) 100

Ship Channel Chemicals Company (Delaware) .. 100

TENN-USS Chemicals Company (Texas General Partnership)

(Ship Channel Chemicals Company has 50% ownership as General Partner)

TENN-USS Chemicals Finance Corporation (Delaware) 50

(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)

Tenneco Exploration, Ltd. (Texas Limited Partnership)

(Tenneco Oil Company has 6.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)

Tenneco Exploration, Ltd. II (Texas Limited Partnership)

(Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has 50% ownership as Limited Partner)

Tenneco LaTerre, Inc. (Delaware) 100

Tenneco Marine Services, Inc. (Delaware) .. 100

Tenneco OCS Company, Inc. (Delaware) 100

Tenneco Oil Pipeline Company (Delaware) 100

Tenneco Retail Service Company (Delaware) .. 100

Tenneco Retail Service Company of Texas (Texas) 100

Tenneco Storage Limited Partnership (Louisiana Limited Partnership)

(Tenneco Oil Company has 50% ownership as General Partner and Southwestern Life Insurance Company has 50% ownership as Limited Partner)

Tenneco Storage Capital Corporation 100

TINCO, Ltd. (Texas Limited Partnership) (Tenneco Oil Company has 56.7% ownership as General Partner and LEDCO, Ltd. has 43.3% ownership as Limited Partner)	
Viscosity Oil Company (Illinois)	100%
Tenneco Oil Company of Nigeria (Delaware)	100
Tenneco Oil of Nigeria Unlimited (Nigeria)	50
Tenneco Phosphate, Inc. (Delaware)	100
Tenneco Polymers, Inc. (Delaware)	100
Tenneco Resins, Inc. (Delaware - in dissolution)	100
Tenneco Eastern Realty, Inc. (New Jersey)	100
Tenneco Synfuels Company (Delaware)	100
Tenneco Uranium, Inc. (Delaware)	100
Tennessee Gas Pipeline Corporation (Delaware)	100
Tennessee Overthrust Gas Company (Delaware)	100
Tenngasco Corporation (Delaware)	100
Creole Gas Pipeline Corporation (Louisiana)	100
Tenngasco Exchange Corporation (Delaware)	100
Tenngasco Gas Gathering Company (Delaware)	50
Tenngasco Gas Supply Company (Delaware)	100
HT Gathering Company (Texas)	50
Oasis Pipeline Company (Delaware)	20
Tenngasco Marketing Corporation (Delaware)	100
TLC Oil Company (Delaware)	100
Walker Deutschland GmbH (Germany)	100
West Africa Corporation (Delaware)	100
Tenneco Oil Company of Nigeria Unlimited (Nigeria)	50
Tenneco Delta XII Gas Co. Inc. (Delaware)	100
Tenneco LNG International Inc. (Panama)	100
Tenneco Energy Ltd. (Canada)	100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands)	100
Tenneco InterAmerica Inc. (Delaware)	100
Tenneco International Energy, Inc. (Delaware)	100
Tenneco International Energy, Inc. (Panama)	100
Tenneco International Inc. (Delaware)	100
A B Starla-Werken (Sweden)	100
J. I. Case Sweden A.B. (Sweden)	100
Sara Gretes Cafeteria AB (Sweden)	50
Tenneco Transicol AB (Sweden)	100
Case Belgium Inc. (Delaware)	100
Case France, S.A. (France)	100
Societe Francaise Immobiliere Franim (France)	100
Case Iberica, Inc. (Delaware)	100
Case Iberica, S.A. (Spain)	100

Case Tracteurs S.A. (France)	100%
Case Traktoren GmbH (Germany)	100
Compania de Financiacion Case, S.A. (Spain)	100
Etablissement Robert Bellanger, S.A. (France)	100
Speedy Et Cie SNC (France) Etablissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
J. I. Case (Australia) Pty., Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case S.A. (Spain)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case S.W.A. (Proprietary) Ltd. (South West Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
Monroe Australia Proprietary Limited (Australia)	100
Wylie Superannuation Pty. Ltd. (Australia)	100
Omni-Pac GmbH (Germany)	1
Omni-Pac S.A.R.L. (France)	97
Poclain do Brasil S.A. (Brazil)	100
P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99
Riverside Date International, Inc. (Delaware)	100
Tunisian American Date Company (Tunisia)	49
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (Poclain-Monroe-Petro-Tex) N.V. (Belgium)	100
Somadoc N.V. (Belgium)	100
Societe Anonyme Industrielle des Resines (France)	100
Speedy Inc. (Delaware)	100
Speedy Et Cie SNC (France) (Speedy Inc. has 1% ownership and Etablissement Robert Bellanger, S.A. has 99% ownership)	
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Trading Company (Delaware)	100
Tenneco Deutschland Beteiligungs GmbH (Germany)	100

Case Vibromax GmbH (Germany)	98%
Case Vibromax GmbH und Co. (Germany)	2
Vibromax Australia (Pty) Ltd. (Australia)	99
Vibromax France SARL (France)	99
Vibromax SCI (France)	99
Omni-Pac GmbH (Germany)	99
Omni-Pac ApS (Denmark)	100
Omni-Pac A.B. (Sweden)	100
Omni-Pac S.A.R.L. (France)	3
Pit-Stop Auto Services GmbH (Germany)	100
Poclain GmbH (Germany)	100
Case Poclain GmbH & Co. (Germany)	2
Chance Gesellschaft Fuer Baumachinau MbH	100
Wilhelm Weller, Herstellung und Vertrieb von Strassenwalzen, GmbH (Germany)	100
Vibromax France SARL (France)	1
Vibromax SCI (France)	1
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Europe Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco Holdings B.V. (Netherlands)	100
Tenneco Nederland B.V. (Netherlands)	100
Case Poclain GmbH & Co. (Germany)	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany)	100
Gebr. Broere B.V. (Netherlands)	100
Antwerp United Tanker Agencies N.V. (Belgium)	100
Agence Maritime Eurotank N.V. (Belgium)	100
Depositas Del Norte, S.A. (Spain)	50
(Spain)	26
Terminales Quimicos S.A.	
Tank Terminals Rotterdam, B.V. (Netherlands)	100
Tankvaart Dordrecht, B.V. (Nether lands)	100
Case Vibromax GmbH und Co. (Germany)	98
Vibromax Australia (Pty) Ltd. (Australia)	100
Tenneco Transicol B.V. (Netherlands)	100
Nederlandsche Bewoid Maatachappij B.V. (Netherlands)	100

Tenneco Holdings Danmark A/S (Denmark)	100%
Case Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
Lydex A/S (Denmark)	100
J. I. Case A/S (Denmark)	100
Herning Traktor-og Masking Forretning Aps (Denmark)	100
Tenneco International Marketing Company (Delaware)	100
Tenneco International N.V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100
Tenneco Oil Company of Colombia (Delaware)	100
Tenneco Oil Company Norsk A/S (Norway)	100
Tenneco Oil Company of the Bahamas (Delaware)	100
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware)	100
Tenneco Sudan, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100
J. I. Case Europe Limited (Delaware)	100
Case Credit Limited (United Kingdom)	100
International Harvester Company of Great Britain Limited (United Kingdom)	100
Omni-Pac U.K. Limited (United Kingdom)	100
Hartmann Fibre Limited (United Kingdom)	100
Tenneco International Finance Limited (United Kingdom)	100
Case Credits Limited (United Kingdom)	100
Tenneco International Finance BV (Netherlands)	100
Tenneco International Finance Corporation Limited (Delaware)	100
Tenneco International Holdings Limited (United Kingdom)	100
Albright & Wilson Limited (United Kingdom)	100
ACC (Fertilisers) Ltd. (United Kingdom)	100
FCL Crop Protection, Ltd. (United Kingdom)	100
Robt. Stephenson & Son, Ltd. (United Kingdom)	100

The Farmers Co., Ltd. (United Kingdom)	100%
Albright & Wilson A.B. (Sweden)	100
Albright & Wilson A/S (Norway)	100
Albright & Wilson Asia Trading (H.K.) Limited (Hong Kong)	100
Albright & Wilson Trading Pte Limited (Singapore)	100
Albright & Wilson Asia Trading (Malaysia) Sdn Bhd (Malaysia)	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom)	100
Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom)	100
Albright & Wilson GmbH (Austria)	100
Albright & Wilson Intertrade Ltd. (United Kingdom)	100
Albright & Wilson Investments (PTY), Ltd. (Australia)	100
Albright & Wilson (Australia) Limited (Australia)	57
Gardinol Products (PTY), Ltd. (Australia)	100
National Brands (PTY), Ltd. (Australia)	100
Albright & Wilson New Zealand Limited (New Zealand)	100
Albright & Wilson (Langley) Ltd. (United Kingdom)	100
Albright & Wilson (Malaysia) SDN. BHD. (Malaysia)	100
Albright & Wilson (Marchon) Pte. Limited (Singapore)	100
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)	100
Albright & Wilson (Mfg.) Ltd. (United Kingdom)	100
Albright & Wilson Oils SDN BHD (Malaysia)	100
Albright & Wilson Overseas Ltd. (United Kingdom)	100
Akulu Chemicals Coast Limited (South Africa)	50
Akulu Marchon (PTY) Ltd. (South Africa)	50
Akulu Chemicals (PTY) Ltd. (South Africa)	50

Marchon-Paragon Holdings (PTY) Ltd. (South Africa)	100%
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa)	50
Albright & Wilson Aps (Denmark)	100
Albright & Wilson BV (Netherlands)	100
Albright & Wilson GmbH (Germany)	100
Albright & Wilson International Finance BV (Netherlands)	100
Albright & Wilson Ireland Ltd. (Eire)	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom)	100
Ibex Ltd. (Ireland)	100
Thawpit (Ireland) Ltd. (Ireland)	100
Albright & Wilson SpA (Italy)	100
Leopack SpA (Italy)	100
Marchon Espanola S.A. (Spain)	100
Marchon France S.A. (France)	100
Marchon Hellas Ltd. (Greece)	100
Marchon Italiana SpA (Italy)	100
Marchon Sud SpA (Italy)	100
Polyphosphates Inc. (Philippines)	40
Albright & Wilson Pension Investments Ltd. (England)	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil)	100
Albright & Wilson Resins and Organics Limited (United Kingdom)	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom)	100
E. P. Potter & Co. Ltd. (United Kingdom)	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom)	100

Albright & Wilson (Warley) Ltd. (United Kingdom) 100%
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom).... 100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia).. 100
Albright, Morarji and Pandit Limited (India) 39.9
Astoria Shipping & Transport Co., Ltd. (United Kingdom) 100
Cambray Ltd. (United Kingdom)..... 100
Clifford Christopherson & Co., Ltd. (United Kingdom) 100
Cumbria Trading Co., Ltd. (United Kingdom) 100
Detergent Chemical Limited (United Kingdom) 100
Electropol Ltd. (United Kingdom).... 100
General Phosphates Co. (England).... 100
Leo Lines, Ltd. (United Kingdom).... 100
Mallison Feeds, Ltd. (United Kingdom) 100
Marchon Products, Ltd. (United Kingdom) 100
Mays Chemical Manure Co., Ltd. (United Kingdom) 100
Mortimer Investment Co. Limited (United Kingdom) 100
Proban Ltd. (United Kingdom) 100
Solway Chemicals, Ltd. (United Kingdom) 100
Stockport United Chemical Co. Ltd. (United Kingdom) 100
Tenneco Malros Ltd. (United Kingdom) 100
Tenneco Organics Ltd. (United Kingdom) 100
Arndale Fuels Ltd. (United Kingdom) 50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)
Bracey Petroleum Products Ltd. (United Kingdom).... 50
Butler Oil Products Ltd. (United Kingdom) 50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)

Elston Oils Limited (United Kingdom)	100%
Gough Oils Ltd. (United Kingdom)	100
John Oils Limited (United Kingdom)	100
Compass Chemical Company, Ltd. (United Kingdom)	100
The Scottish Chemical Co., Ltd. (United Kingdom)	100
Thomas Tyrer & Co. Ltd. (United Kingdom)	100
Case-Poclain Limited (United Kingdom)	100
CC Finance Limited (United Kingdom)	100
David Brown Tractors Limited (United Kingdom)	100
David Brown Tractors (Belfast) Ltd. (United Kingdom)	100
David Brown Tractors (Ireland) Ltd. (Ireland)	100
David Brown Tractors (Retail) Ltd. (United Kingdom)	100
A. M. Exports Limited (United Kingdom)	100
Poclain Limited (United Kingdom)	100
Tractorwork, Limited (United Kingdom)	100
Harmo Industries, Ltd. (United Kingdom)	100
Birmingham Filters Limited (United Kingdom)	100
Brames Limited (United Kingdom)	100
D. P. Miller & Sons Limited (United Kingdom	100
Harmo Pressings Limited (United Kingdom)	100
Harmo Steel Co. Limited (United Kingdom)	100
Harmo Tubes Limited (United Kingdom)	100
F. Mould Limited (United Kingdom)	100
F. Mould (Silencers) Limited (United Kingdom)	100
J. W. Hartley (Motor Trade) Limited (United Kingdom)	100
Fisher & Mould Limited (United Kingdom)	100

Harmo Auto Services (Export) Limited (United Kingdom)	100%
Harmo Auto Services Limited (United Kingdom)	100
Harmo Export Ltd. (United Kingdom)	100
Harmo Filters Limited (United Kingdom)	100
Harmo Technical Development Limited (United Kingdom)	100
Steering & Suspension Limited (United Kingdom)	100
Karobes Limited (United Kingdom)	100
Midland Trim & Equipment Ltd. (United Kingdom)	100
The Harmo Engineering Co. Limited (United Kingdom)	100
Houston Data Venture (U.K.) Limited (United Kingdom)	100
J. I. Case Company Limited (United Kingdom)	100
LaTerre Petroleum (U.K.), Limited (United Kingdom)	100
Monroe Auto Equipment U.K. Limited (United Kingdom)	100
Tees Storage Company Limited (United Kingdom)	50
Tenneco Walker (U.K.) Limited (United Kingdom)	100
Tenneco West Limited (United Kingdom)	100
Tenneco United Kingdom, Inc. (Delaware)	100
Tenneco Venezuela, Inc. (Delaware)	100
Thompson and Stammers Dunmow Limited (United Kingdom)	100
TOL-Transicol Chemie GmbH (West Germany)	100
Universaltrac Beteiligungs GmbH (Germany)	100
Intertractor Viehmann GmbH & Co. (Germany)	50
Intertractor A.G. (Switzerland)	100
Intertractor America Corporation (Delaware)	100
Intertractor G.B. Ltd. (United Kingdom)	100
Intertractor Italiana S.R.L. (Italy)	100
Walker Europe, Inc. (Delaware)	100
Walker Norge A/S (Norway)	100
Tenneco LNG Inc. (Delaware)	100
Tenneco Norway LNG Inc. (Delaware)	100
Tenneco Realty, Inc. (Delaware)	100

First National Services, Inc. (Delaware)	100%
Inmobiliaria Belgrado, S.A. (Mexico)	100
Ten Ten Travis Corporation (Delaware)	100
Tennchase, Inc. (Texas)	100
Tenneco Realty Development Corporation (Delaware)	100
Meadows of the Kern Mutual Water Company (California)	100
Stockdale Coffee Company (California)	100
Stoco Mutual Water and Sewer Company (California)	70
Tenneco Arizona Property Corporation	100
Tenneco Property Corporation (California)	100
Uplands of the Kern Mutual Water Company (California)	100
Tennessee Gas Building Corporation (Delaware)	100
TRI Realty, Inc. (Texas)	100
Tenneco Shale Oil Company (Delaware)	100
Tenneco SNG Inc. (Delaware)	100
Tenneco Trinidad LNG, Inc. (Delaware)	100
Tenneco Ventures Inc. (Delaware)	100
Tennessee Gas Marketing Company (Delaware)	100
Tennessee Gas Services, Inc. (Delaware)	100
Tennessee Gas Transmission Company (Delaware)	100
Tennessee Iroquois Gas Company (Delaware)	100
Tennessee Niagara Gas Company (Delaware)	100
Tennessee Ozark Gas Company (Delaware)	100
Tennessee Storage Company (Delaware)	100
Tennessee Trailblazer Gas Company (Delaware)	100
Tennessee Trans-Anadarko Gas Co. (Delaware)	100
THC Pipeline Company (Delaware)	100
Walker Manufacturing Company (Delaware)	100
Walker Marketing Corporation (Wisconsin)	100

Supreme Court, U.S.
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FEB 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TENNECO OIL COMPANY,
Petitioner

v.

KERN OIL & REFINING CO.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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February 9, 1987

24pp

QUESTIONS PRESENTED

1. Was it an abuse of discretion for the District Court to deny Petitioner's Rule 41(a)(2) motion for voluntary dismissal without prejudice based on the factual finding that Petitioner was "judge shopping?"
2. If the District Court's decision had not been based on the ground of judge shopping, would it have been an abuse of discretion to deny Petitioner's motion based on the extent of legal prejudice to Respondent, including preparation up to the day of trial?
3. Was it an abuse of discretion for the District Court to grant Respondent's Rule 41(b) motion for involuntary dismissal with prejudice after Petitioner's counsel, on instructions from Petitioner, refused to try the case?
4. Is there a conflict among the Circuits on any of the preceding questions?

RULE 28.1 STATEMENT

Respondent Kern Oil & Refining Co. has no subsidiaries that are not wholly owned and is not a subsidiary or affiliate of any other company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Tenneco Oil Company ("Tenneco") distorts the holdings of the courts below and attempts to fabricate a conflict among the Circuits in order to justify review by this Court. The District Court's decision to deny Tenneco's motion to dismiss without prejudice under Rule 41(a)(2) was based on its conclusion that "Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and [Judge Real] and having the same claim heard by Judge Waters; thus, they constitute impermissible forum shopping." Finding of Fact No. 24, Pet. 27a. The

District Court's decision to grant the Rule 41(b) motion of Respondent Kern Oil & Refining Co. ("Kern") for dismissal with prejudice was based on Tenneco's calculated refusal to try the case after its motion for dismissal without prejudice had been denied. Conclusion of Law No. 5, Pet. 28a. The extent of prejudice to Kern was only one—and not the most important—of the factual determinations made by the District Court in support of its decisions. Pet. 23a-28a. Even had the District Court's decisions been based solely on the extent of prejudice to Kern, as Tenneco contends, the purported conflict among the Circuits as to whether this would be an abuse of discretion simply does not exist.

The Ninth Circuit, in affirming the District Court's actions, held that "[t]he circumstances of this case support the district court's finding that Tenneco was forum shopping," Pet. 19a, and concluded: "In light of Judge Real's findings of fact . . . the dismissal of Count IV did not constitute an abuse of discretion." Pet. 21a. The full Circuit bench, in turn, declined without dissent to rehear *en banc* the panel's unanimous decision. Pet. App. D.

Petitioner cites no authority—and there is none—to support the proposition that "judge shopping" cannot be considered by a district court in deciding whether to grant or deny a Rule 41(a)(2) motion. Instead, Petitioner attempts to reargue this issue of fact here, contending that the District Court's finding was incorrect and that Petitioner had other, legitimate reasons for seeking the dismissal. Pet. 16-18. These fact-bound arguments were rejected by the lower courts on numerous occasions, and Petitioner presents no persuasive reason why they should be retried here.

In granting Respondent's Rule 41(b) motion to dismiss with prejudice, the District Court's exercise of discretion was based on Petitioner's deliberate refusal to commence trial on the appointed day. Pet. 26a-28a. Again Petitioner cites no precedent that such a ruling constitutes an abuse of discretion.

Finally, even if the District Court had based its denial of Petitioner's Rule 41(a)(2) motion exclusively on the extensive and completed trial preparation, as Petitioner alleges, Pet. 7, the petition fails to establish the existence of a conflict among the Circuits justifying this Court's intervention. Tenneco refers to some fourteen cases allegedly supporting its proposition that the Circuits apply differing standards in determining whether a district court's denial of a Rule 41(a)(2) motion constitutes an abuse of discretion. However, ten of the cases involve situations in which plaintiff's motion was *granted*, not denied, or in which the issue was not before the court. These cases are therefore irrelevant to the issue of trial court discretion to *deny* such a motion and, indeed, demonstrate the deference of higher courts to fact-based discretionary rulings. Moreover, the remaining four cases cited by Petitioner in which the Court of Appeals actually decided the relevant question present no conflict. Thus, on the factual record here, there is no conflict among the Circuits and no conceivable basis for the granting of a writ of certiorari.

STATEMENT OF FACTS

Tenneco's lost profits counterclaim was first asserted in August 1981 as Count IV of its counterclaim in this case. CR 5; ER 20-21[1]. The same claim was raised again in March 1983 (nine months earlier than is implied in the Petition, p. 6) as the First Count of Tenneco's counterclaim in Case No. 82-6275, ER 728, and as Count I of its counterclaim in Case No. 81-3253, ER 735, which cases were then pending in the Central District of California and were later consolidated before Judge Waters. By agreement of the parties—not, as Tenneco implies, Pet. 18, at the sole instance of Kern—the price and supply cases were kept separate.

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[1] Citations to "CR" are to the Clerk's Record, with the number following being the docket number assigned by the District Court Clerk. Citations to "ER" are to the Excerpt of Record and Supplementary Excerpt of Record filed with the Court of Appeals. Citations to "RT" are to the Reporter's Transcript.

From 1981 through the discovery cutoff in September 1983, the parties took extensive discovery in this case into the lost profits counterclaim. Tenneco pushed for an early trial date, and a condition of Kern's June 1983 substitution of counsel was that Kern would not seek to delay trial, then set for September 1983.

After discovery was completed, Kern moved for summary judgment on Count IV based on the *force majeure* clause of the relevant contracts between the parties. CR 74. Tenneco, apparently satisfied with its discovery on Count IV, opposed the motion on the merits, filed a cross-motion for summary judgment, CR 82, and did not seek either to reopen discovery or to rely on Rule 56(f). In February 1984 Judge Marshall, before whom the case was then pending, granted Kern's motion and dismissed Count IV. CR 99. Tenneco immediately began discovery into the identical lost profits counterclaim in the cases before Judge Waters, duplicating depositions and document requests already made in this case. ER 760; ER 762. In March 1984 Tenneco filed with Judge Marshall a motion for reconsideration of the summary judgment decision, CR 109; ER 235, and for the first time sought, in a mislabeled motion to "non-suit," to dismiss Count IV without prejudice. ER 249.

In its motion, Tenneco stated that it sought to dismiss Count IV so that it could pursue that claim in the cases pending before Judge Waters. *Id.* Nevertheless, its motion was not filed until *after* Judge Marshall had ruled adversely to it, *after* its lost profits counterclaim had been pending in the cases before Judge Waters for one full year, and *after* its lost profits counterclaim had been pending in this case for almost three years. Tenneco stated that it had pursued its lost profits counterclaim in this case rather than in Judge Waters' cases "because this case was going to trial before the other cases." ER 251. Kern, in its opposition to the motion, CR 120; ER 255,

pointed out Tenneco's forum shopping and the potential for prejudice to Kern. ER 272-77. Judge Marshall took the motions for reconsideration and "non-suit" under submission.

As of early March 1984, the case was set for trial before Judge Marshall on April 3. CR 92. The parties had filed their Memoranda of Contentions, CR 95; CR 101, Witness Lists, CR 96; CR 98, and Joint Exhibit List, CR 97, in February, before Judge Marshall dismissed Count IV, and had thoroughly addressed Count IV in the Memoranda and identified witnesses and exhibits specific to that claim. After Judge Marshall granted summary judgment, her clerk informed the parties that Judge Marshall would be unable to try the remainder of the case before early June and was considering transferring it to a different judge for trial. Kern proposed that the parties stipulate to postpone the trial until Judge Marshall could hear it, ER 776, but Tenneco insisted on trying the case "at the earliest possible setting." ER 777. Additionally, Tenneco sought—unsuccessfully—permission to delay filing its intended motions for reconsideration and "non-suit" until the new judge was named. Pet. 20a. On March 12, Tenneco filed its motions for reconsideration and non-suit, and on March 20, 1984, Judge Marshall transferred the case to Judge Real for trial, retaining the pending motions. CR 110; ER 343.

In June 1984 the case (minus Count IV) was tried to Judge Real, who ruled in favor of Kern on all issues before him. CR 506; ER 386. After conclusion of trial, the parties learned that Judge Marshall had vacated her summary judgment decision, CR 500, thus reinstating Count IV for trial. But Judge Marshall had not ruled on Tenneco's motion to non-suit. On July 30, Judge Real *sua sponte* set trial of "the *force majeure* issue" for August 20. CR 508; ER 391. On August 3 Judge Marshall issued a minute

order denying Tenneco's motion to non-suit Count IV, CR 507; ER 390, and on August 6, Judge Real issued an Order stating that the August 20 trial would encompass all issues relating to Count IV, including all defenses raised by Kern and the issue of Tenneco's damages. CR 509; ER 392.

On August 13—one week before the date set for trial —Tenneco filed with Judge Real an *Ex Parte* Application for Voluntary Dismissal of Count IV Without Prejudice. ER 146. Again, Tenneco stressed the fact that the same lost profits counterclaim was pending before Judge Waters. ER 148-49. Kern responded that Tenneco's application was an impermissible horizontal appeal of Judge Marshall's denial of the motion to non-suit, emphasized that Tenneco was "judge shopping," pointed out the extent of Kern's preparation for trial on August 20, and noted that Judge Real's decision at trial of Count IV would eliminate any need to try the lost profits counterclaim in the cases pending before Judge Waters. ER 203.

During the week of August 13, Tenneco and Kern submitted trial briefs, CR 512; CR 515; CR 518, proposed findings of fact and conclusions of law, *see* ER 276, a joint supplemental exhibit list, CR 519, witness lists, CR 514; CR 517, and pretrial conference orders, CR 513; CR 511. The parties identified, exchanged and assembled court sets of the trial exhibits. Tenneco designated testimony from the depositions of twenty-six individuals. Kern carefully reviewed all the testimony and exhibits designated by Tenneco and submitted counter-designations and objections. In all, thirty-four depositions (thirty-seven volumes of testimony) were marked and lodged with Judge Real for trial of Count IV. ER 770-71.

On August 20 the parties appeared before Judge Real for trial. Judge Real heard argument on Tenneco's *Ex Parte* Application for Voluntary Dismissal, and Tenneco once more made it very plain that it sought to dismiss Count IV from this case for the purpose of trying its lost

profits counterclaim to Judge Waters. Judge Real denied Tenneco's application and informed the parties that trial of Count IV would commence on August 22 or 23. 8/20-22/84 RT:7.

In the late afternoon of August 20, Tenneco filed an emergency petition with the Ninth Circuit seeking a writ of mandamus or prohibition (and a stay pending determination of the writ issue), requesting that court to compel Judge Real to vacate the trial setting and to dismiss Count IV without prejudice. Once again, Tenneco emphasized the fact that the very same lost profits counterclaim was pending before Judge Waters. Late in the afternoon of August 21 the parties learned that the Ninth Circuit had denied Tenneco's petition for a stay, thus effectively denying the petition for a writ. ER 772.

At 9:00 a.m. the following morning, August 22, 1984, the District Court convened for trial of Count IV. Tenneco once again asked Judge Real to be allowed to dismiss its lost profits counterclaim without prejudice. Tenneco's counsel, upon being requested by Judge Real to speak as an Officer of the Court, admitted that Tenneco intended to pursue the same claim before Judge Waters. Finding that Tenneco was engaging in forum shopping, Judge Real denied Tenneco's motion and invited Tenneco to present its opening statement. Counsel for Tenneco then advised Judge Real that his client had told him that he had "no authority to proceed" or to "put on any evidence." He stated that he had "no witnesses," "no documents," and "no authority at this time at all from Tenneco to participate in any trial." Upon Kern's motion, Judge Real ordered dismissal of the lost profits counterclaim with prejudice against Tenneco pursuant to Fed. R. Civ. P. 41(b). 8/20-22/84 RT:14-21.

On September 4, Judge Real signed an Order Denying Tenneco's Motion for Voluntary Dismissal, CR 520; ER 416, an Order and Judgment on Count IV (dismissing it

with prejudice against Tenneco and granting judgment "on the merits" in favor of Kern), Pet. 30a-31a, and Findings of Fact and Conclusions of Law regarding Count IV, Pet. 22a-29a.[2]

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[2] The Findings and Conclusions state, *inter alia*, that:

Tenneco had filed "the same counterclaim" in the cases pending before Judge Waters, Finding of Fact 2;

"Tenneco could have moved for dismissal of Count IV without prejudice at least as early as March 1983, the time when it filed its lost profits counterclaim in Cases No. 82-6875 and 81-3253," Finding of Fact 9;

"Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and this Court and having the same claim heard by Judge Waters" and constituted "impermissible forum shopping," Finding of Fact 24;

"Kern would be prejudiced by a voluntary dismissal of Count IV without prejudice because of, *inter alia*, the extensive discovery taken in this case, the burden of potentially duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial on August 20, and the fact that Count IV arising out of the contract before the Court in the first trial makes Count IV a compulsory counterclaim in this case," Finding of Fact 25;

"Because this Court is already familiar with some of the issues to be tried regarding the lost profits counterclaim, it would be against the interests of the economies of the parties and judicial economy to allow dismissal of Count IV without prejudice," Finding of Fact 26;

"Tenneco would not be prejudiced by having to litigate Count IV in this case because it has had, *inter alia*, ample opportunity to conduct discovery into the facts of the lost profits counterclaim, adequate notice of the issues to be tried, and sufficient opportunity to prepare for trial," Finding of Fact 27;

"[O]n the facts of this case Tenneco is not entitled to ... dismissal [without prejudice]," Conclusion of Law 3;

"Tenneco's lost profits counterclaim is a compulsory counterclaim under Fed. R. Civ. P. 13(a)," Conclusion of Law 4; and

"Due to Tenneco's failure and refusal to begin trial of Count IV on August 22, Kern is entitled to judgment on the merits and dismissal of Count IV of the Counterclaim with prejudice to Tenneco pursuant to Fed. R. Civ. P. 41(b) and Local Rule 27," Conclusion of Law 5.

Tenneco appealed the Order and Judgment on Count IV to the Ninth Circuit. On June 24, 1986, the Ninth Circuit affirmed the District Court's decision. Pet. App. A. On September 11, 1986, the Court of Appeals denied Tenneco's petition for rehearing and the suggestion for rehearing *en banc*. Pet. App. D.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Is a Routine Case Where a Court of Appeals Has Affirmed a District Court's Exercise of Discretion in Denying a Rule 41(a)(2) Motion for Dismissal Without Prejudice.

The standard for review of a district court's denial of a Rule 41(a)(2) motion is, of course, abuse of discretion. *See, e.g., Andes v. Versant Corporation*, 788 F.2d 1033, 1036-37 (4th Cir. 1986); *McCants v. Ford Motor Company, Inc.*, 781 F.2d 855, 857 (11th Cir. 1986); *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981); *Williams v. Ford Motor Credit Company*, 627 F.2d 158, 160 (8th Cir. 1980); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *see also* 5 Moore's Federal Practice ¶41.05[3] (2d ed. 1986). Petitioner acknowledges this standard, Pet. 19-20, but tries to sidestep it by suggesting that the only consideration before Judge Real when he decided to deny its motion to dismiss was the extensive amount of preparation for trial. According to Petitioner, "[t]he question at issue in this case can be so stated: Is the mere expense of litigation and preparation for trial 'plain legal prejudice' to a defendant sufficient to justify denial of a motion for voluntary dismissal under Rule 41(a)(2)?" Pet. 20.

This misstates the holdings that Petitioner seeks to have reviewed by this Court. Far from being based exclusively on trial preparation expense, Judge Real's decision was grounded on Tenneco's "judge shopping,"

supported by the extent of prejudice to Kern and other considerations. Pet. 27a-28a. The Ninth Circuit recognized the foundation of the District Court's decision, questioning the extent of prejudice to Kern, Pet. 21a, but nonetheless holding that the District Court's decision was supported by the Findings of Fact—*i.e.*, the findings relating to Tenneco's forum shopping,[3] *id.* When Judge Real decided the motion, he knew that, until Judge Marshall ruled against Tenneco in March 1984, Tenneco had pushed vigorously for an early trial date for its counterclaim before her, to the point of insisting that Kern's substitution of counsel in June 1983 not be used to delay the trial. He knew that Tenneco had not made its motion to dismiss in Judge Marshall's court until after she had ruled against Tenneco on Kern's summary judgment motion, and only after Tenneco had sought unsuccessfully to delay filing its motion to dismiss until a new judge was named. He knew that Tenneco had not made its motion to dismiss in his court until after he, in turn, had ruled against Tenneco in the June 1984 trial of Kern's affirmative claims. He was already familiar with some of the issues relating to the counterclaim because of the June 1984 trial, and he knew that rebriefing and trying these issues before Judge Waters would represent a substantial waste of the parties' and the judiciary's resources. Pet. 27a. He believed—and found —that Tenneco's acknowledged efforts to dismiss so that it could try the counterclaim before Judge Waters constituted another instance of "impermissible forum shopping." Thus, his decision denying Tenneco's motion for voluntary dismissal was a decision squarely within the discretion of the District Court. The Ninth Circuit's affirmance was a routine confirmation of that exercise of discretion.

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[3] Hence, the Ninth Circuit did not, as Petitioner contends, Pet. 15 n.9, back away from its ruling in *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143 (1982). In fact, it relied on that ruling. Pet. 18a.

II. The District Court Did Not Abuse Its Discretion by Considering the Fact that Petitioner Was "Judge Shopping."

Petitioner does not—and indeed cannot—dispute that Tenneco's judge shopping could appropriately be considered by the District Court when exercising its discretion under Rule 41(a)(2). *See, e.g., Conafay v. Wyeth Laboratories*, 793 F.2d 350, 353 (D.C. Cir. 1986)(movant's "good faith" recognized as a factor); *Puerto Rico Maritime Shipping Authority, supra*, 668 F.2d at 49 ("good faith" of movant considered in affirming dismissal without prejudice); *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856, 857 n.1 (8th Cir. 1975)(movant's forum shopping sufficient reason for denying motion); *Pace v. Southern Express Company*, 409 F.2d 331 (7th Cir. 1969)(movant's conduct of litigation recognized as a factor); *Kennedy v. State Farm Mutual Automobile Insurance Company*, 46 F.R.D. 12, 15 (E.D. Ark. 1969)(movant's forum shopping sufficient reason for denying motion); *Southern Maryland Agricultural Association v. United States*, 16 F.R.D. 100, 102 (D. Md. 1954)(motion denied because movant was forum shopping); *see also* 5 Moore's Federal Practice ¶41.05[1] (2d ed. 1986) and authorities cited therein.

Federal policy against such judge shopping is clear and unequivocal. *See, e.g., McCuin v. Texas Power & Light Company*, 714 F.2d 1255, 1261-65 (5th Cir. 1983); *Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d 1197, 1203 (2d Cir. 1970); *United States v. Kelley*, 519 F. Supp. 1029 (D. Mass. 1981). Petitioner grudgingly acknowledges that the District Court's holding was based on Tenneco's judge shopping, Pet. 16, but then argues that Tenneco "simply sought to try its supply counterclaim in the supply litigation," *id.*, attempting to relitigate a factual proposition that the District Court considered and rejected, Pet. 27a. Petitioner completely ignores the fact that Judge Real's finding was expressly affirmed by the Ninth Circuit,

which held that "the district court was justified in finding that Tenneco was forum shopping," Pet. 20a, and that Judge Real's decision was supported by the record, Pet. 19a-21a.

Since the decisions below were premised on Judge Real's finding that Tenneco was judge shopping, the only legitimate basis for the present petition would be that this finding was "clearly erroneous"—a proposition not even argued by Petitioner.

III. On the Facts Of This Case, the District Court Did Not Abuse Its Discretion in Finding Sufficient Legal Prejudice to Respondent to Justify Denial of Petitioner's Motion.

Even if forum shopping had not been a primary basis for the District Court's decision denying Tenneco's motion, Judge Real's findings, based on the record before him, amply support his exercise of discretion. Although Tenneco would have this Court believe that the only factor considered by the District Court was "the expense of preparation for trial," Pet. (i), 7, the District Court in fact considered "the burden of potential duplicative discovery," the familiarity of the Court "with some of the issues to be tried," and the lack of prejudice to Tenneco from having to litigate the matter in light of its "ample opportunity to conduct discovery into the facts of the lost profits counterclaim, adequate notice of the issues to be tried, and sufficient opportunity to prepare for trial." Pet. 27a-28a. These findings, together with the finding of forum shopping, the timing of the motion and the "deference" to which Judge Marshall's earlier denial "was entitled," Pet. 21a, provided an abundant basis for Judge Real's decision to deny the motion and the Ninth Circuit's affirmance of that exercise of discretion.

IV. The District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Counterclaim With Prejudice When Petitioner Refused to Put On its Case.

In ruling on an involuntary dismissal with prejudice under Rule 41(b) for failure to prosecute, the proper focus of a district court is on plaintiff's conduct, not on prejudice to the defendant. *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956); *Hicks v. Bekins Moving & Storage Company*, 115 F.2d 406 (9th Cir. 1940). On the very day of trial, Tenneco flatly refused to proceed with its case. 8/20-22/84 RT: 14-21, Pet. 27a. As the Ninth Circuit confirmed, Tenneco proceeded "at its peril" in taking a dismissal with prejudice under Rule 41(b) rather than proceeding with trial. Pet. 19a, quoting from *Blue Mountain Construction Company v. Werner*, 270 F.2d 305, 307 (9th Cir. 1959), *cert. denied*, 361 U.S. 931 (1960) (affirming dismissal with prejudice when plaintiff refused to proceed after its motion for voluntary dismissal was denied); *cf. Paturzo v. Home Life Insurance Company*, 503 F.2d 333 (4th Cir. 1974) (plaintiff moved for voluntary dismissal on the very morning of trial, the motion was denied, and the Court of Appeals upheld the denial "in view of the advanced stage of the proceedings").

V. There Is No Conflict Among the Circuits Justifying the Grant of a Writ of Certiorari.

It is clear that the District Court's denial was grounded on much more than the "mere" expense of preparation for trial. In the particularized factual circumstances of this case, including Petitioner's blatant forum shopping, there is no conflict of Circuits that would remotely warrant review by this Court. Moreover, even if Tenneco were correct and Judge Real had based his denial of Tenneco's motion to dismiss exclusively on the expense of preparation for trial, Petitioner has not shown that there is a conflict among the Circuits on that issue.

Petitioner refers to numerous cases which purportedly support its proposition that other Circuits have held that the expense of preparing for trial does not constitute prejudice to the defendant sufficient to justify denial of a motion for voluntary dismissal. However, all but four of the cited cases either do not address the question or address the wholly different question of whether the district court had abused its discretion in *granting* a motion to dismiss without prejudice under Rule 41(a)(2).[4] Merely because a district court did not abuse its discretion in *granting* a motion to dismiss does not mean that the

[4] The other cases cited by Petitioner in support of its proposition that there is a conflict among the Circuits are: *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986) (dismissal granted and upheld as within the district court's discretion); *Cauley v. Wilson*, 754 F.2d 769 (7th Cir. 1985) (movant contested award of attorney's fees on appeal; issue of district court's discretion in granting dismissal was not at issue); *Kern v. TXO Prod. Corp.*, 788 F.2d 968 (8th Cir. 1984) (dismissal granted and upheld as within the district court's discretion); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983) (non-settling defendants had no standing to challenge plaintiff's settlement with and dismissal of settling defendant; Rule 41(a)(2) examined only for purposes of analogy); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46 (1st Cir. 1981) (district court's dismissal affirmed as no abuse of discretion); *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980) (district court abused its discretion by granting dismissal where trial had been completed and judgment notwithstanding the verdict was pending); *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) (dismissal granted by district court subject to exceptional and unorthodox conditions; the conditions, but not the dismissal itself, found to constitute an abuse of discretion); *Noonan v. Cunard S.S. Co.*, 375 F.2d 69 (2d Cir. 1967) (district court abused its discretion by granting dismissal to allow movant to cure failure to make jury demand); *Stern v. Barnett*, 452 F.2d 211 (7th Cir. 1971) (district court abused its discretion by allowing plaintiff bankrupt to dismiss when dismissal would seriously affect creditors' rights); *Piedmont Interstate Fair Ass'n v. Bean*, 209 F.2d 942 (4th Cir. 1954) (district court abused its discretion when it granted dismissal after answer had been filed, discovery had been made and court had expressed its opinion on the merits favorable to defendant).

court would have abused its discretion had it *denied* the motion. To rule otherwise would eliminate discretion entirely, since "[t]he very concept of discretion presupposes a zone of choice within which the trial courts may go either way." *Kern v. TXO Production Corporation*, 738 F.2d 968, 971 (8th Cir. 1984). Indeed, the very cases cited by Tenneco demonstrate the proper reluctance of appellate courts to interfere with trial court exercises of discretion under Rule 41(a)(2) based on the particular facts before them.

The four cited cases in which a court of appeals addressed the question of whether the district court had abused its discretion when it *denied* a Rule 41(a)(2) motion to dismiss without prejudice do not conflict with the Ninth Circuit's decision here.

As Petitioner accurately points out, *Andes v. Versant Corporation*, 788 F.2d 1033 (4th Cir. 1986), strongly supports the proposition that substantial expenditures alone can constitute prejudice to the defendant sufficient to justify denying plaintiff's motion to dismiss without prejudice. In *Andes*, Chief Judge Winter reasoned that the "significant expenses" incurred by defendants "not only in responding to Andes' complaint and filing motions and memoranda in support of summary judgment, but also by incurring substantial costs of discovery through depositions, production of documents, and the obtaining of expert opinions on English law," constituted "a sufficient basis for denying Andes' 41(a)(2) motion." 788 F.2d at 1036. The Court of Appeals concluded: "we cannot say that the district court abused its discretion in refusing to dismiss without prejudice." *Id.* at 1036-37.

In *Conafay v. Wyeth Laboratories*, 793 F.2d 350 (D.C. Cir. 1986), the D.C. Circuit reached no holding on the issue of whether the district court had abused its discretion in refusing to grant plaintiff's motion to dismiss. "Without assaying the lengths and depths of decisional law in this

respect and without adopting any general rule of law for this Circuit," *id.* at 353, the Court remanded with instructions "to provide reasons for the [district] court's determination." *Id.* at 354. By contrast, Judge Real provided detailed reasons for his determination, Pet. 23a-28a, and the Court of Appeals found them sufficient, Pet. 21a.

Durham v. Florida East Coast Railway Company, 385 F.2d 366 (5th Cir. 1967), is entirely inapposite. The *Durham* decision was based on the perceived obligation of plaintiff's counsel to its client to refuse to proceed to trial after counsel had negligently failed to develop the case. The court found that the effect of the dismissal "was to visit the sins of the lawyer upon his client." *Id.* at 367. Here, the District Court specifically found that Tenneco had sufficient opportunity to prepare for trial, Pet. 28a, and Tenneco itself, as part of its transparent strategy of judge shopping, withdrew from its counsel all "authority . . . to participate in any trial," 8/20-22/84 RT:14-21. In such circumstances, the sanction of dismissal is placed "squarely where it belong[s]." *Redac Project 6426, Inc. v. Allstate Insurance Company*, 412 F.2d 1043 (2d Cir. 1969). The *Durham* decision is simply irrelevant.

Finally, in *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142 (1st Cir. 1961), a "leading case" relied on by Petitioner, Pet. at 9-10, the facts lend no support to the proposition that an extensive investment in time and money preparing for trial cannot justify denial of a Rule 41(a)(2) motion. In that case, the facts are almost the exact reverse of the situation here. There, the case in which the voluntary dismissal was denied was the one that had lain dormant until the defendant pushed for a quick trial; here, the case in which the voluntary dismissal was denied was the one that was fully prepared for trial. There, trial of the same issue would have been inevitable in any event, *id.* at 146; here, there would be, and indeed

was, no need for trial of the claim in Judge Waters' cases because of the *res judicata* effect of a decision on Count IV in this case. There, the other case had been the one first filed, and it was in *that* case that the overwhelming amount of time and effort had been spent in preparation; here, this case was filed well before the cases pending before Judge Waters, and it is in *this* case where all the money and time had been spent. There, the court "did not even purport to exercise discretion," *id.* at 147; here, the district court considered and resolved problems of comity, forum shopping, prejudice to Kern and judicial administration. The difference between *Alamance* and this case is a perfect example of why Rule 41(a)(2) motions for dismissal are relegated to the discretion of the trial courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 86-1133

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The court below upheld denial of Tenneco's motion for voluntary dismissal, and the dismissal of its counterclaim with prejudice, when the only prejudice to Kern was the expense of preparation for trial. Most circuits addressing the question have held that the mere expense of preparation for trial is not legal prejudice justifying denial of a motion for voluntary dismissal. *See, e.g., Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 147 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961); *Durham* v. *Florida East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir. 1967); *Kern* v. *TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984); *McCants* v. *Ford Motor*

Co., Inc., 781 F.2d 855, 856-857 (11th Cir. 1986). Some circuits—like the court below—have arrived at the opposite conclusion. *See Andes* v. *Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986); *Ferguson* v. *Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Nothing in Kern's Brief in Opposition ("Br. Opp.") mitigates the seriousness of this existing conflict in the interpretation of Federal Rule 41, or diminishes the need for this Court to resolve that conflict.

2. Kern seeks to avoid this question by contending that Tenneco was motivated by impermissible forum shopping. The contention is wholly unfounded. It was Kern—not Tenneco—that chose to file separate actions arising out of the same contract. Tenneco's counterclaim was not only common to both actions but was compulsory in both actions, and accordingly Tenneco had no prudent alternative but to file it in both cases. As this Court clearly held in *Southern Construction Co., Inc.* v. *Pickard*, 371 U.S. 57, 60-61 (1962), a counterclaimant with a compulsory counterclaim common to two pending actions has the right to pursue the counterclaim in his choice of the actions. Tenneco simply exercised that right, choosing to pursue its supply counterclaim in the supply litigation. This is not impermissible forum shopping, and branding it as such cannot justify imposing the penalty of dismissal with prejudice—"a drastic sanction to be applied only in extreme situations." *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959).

Kern does not even attempt to reconcile its charge of forum shopping with Tenneco's right under *Southern Construction* to pursue its counterclaim in either action. Tenneco quoted extensively from *Southern Construction* in its Petition, Pet. at 17-18, but Kern does not even cite, much less attempt to distinguish, that case in response. The reason is clear: this Court's decision in *Southern Construction* demonstrates that Tenneco's ac-

tions were fully justified and cannot be labelled impermissible forum shopping.

3. Kern seeks to obscure the conflict among the circuits on the interpretation of Rule 41 by noting that some of the cases cited by Tenneco upheld the granting of a motion to dismiss. Br. Opp. at 3, 14-15. In those cases, the Courts of Appeal held that voluntary dismissal was appropriate precisely *because* there was no prejudice to the other party beyond mere expense of preparation for trial. *See, e.g., McCants* v. *Ford Motor Co., supra*; *Puerto Rico Maritime Shipping Auth.* v. *Leith*, 668 F.2d 46, 50 (1st Cir. 1981); *Kern* v. *TXO Production Corp., supra.* Such cases *do* conflict with decisions—such as that below—upholding denial of voluntary dismissal when trial preparation was the *only* possible prejudice.

Kern's argument is that circuits that uphold granting dismissal when trial preparation is the only prejudice may also uphold denying dismissal under identical circumstances. Acceptance of such an argument would constitute complete abdication of appellate review in any abuse of discretion case. As Judge Friendly has noted, the appellate court in such a case is "bound to choose one way or the other," since "[t]he desirability of achieving consistency among district judges in the same circuit on such an issue and of ayoiidng judge-shopping outweighs that of appellate deference to a determination of the district judge." *Noonan* v. *Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir. 1967). Kern's position would contravene the basic principle that "'[i]t will not do to decide the same question one way between one set of litigants and the opposite way between another.'" *Id.* at 71 n.2 (quoting Cardozo, *The Nature of the Judicial Process* 33 (1921)).

Those circuits holding that *granting* voluntary dismissal is appropriate when the only prejudice is the ex-

pense of preparation for trial necessarily are in conflict with those circuits holding that *denying* voluntary dismissal is appropriate under the *same* circumstances. *See* Pet. at 19-21. Contrary to Kern's assertion, Petitioner has not "fabricate[d] a conflict." Br. Opp. at 1. Indeed, courts and appellate judges themselves have frankly recognized the disagreement on this issue. *See, e.g., Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983); *Conafay* v. *Wyeth Laboratories*, 793 F.2d 350, 354 (D.C. Cir. 1986) (Scalia, J., dissenting). This Court should grant the writ to resolve the conflict and ensure uniform application of this important Federal Rule.

For the foregoing reasons, and those in the Petition, the Court should grant the writ and reverse the judgment below.

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